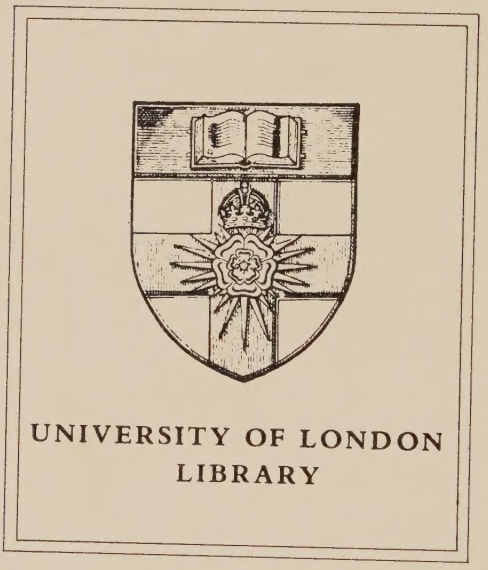
UNIVERSITY OF LONDON LIBRARY

THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

REFERENCE ONLY

346.4
Mx. North



Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1911_2

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir F. A. Bosanquet, K.C.
Vice-Chairman—Robert F. Norton, Esq., K.C.

EX-OFFICIO MEMBERS.

Right Hon. Sir Rufus D. Isaacs, K.C.V.O., M.P.	Attorney-General.
Sir J. A. Simon, K.C.V.O., M.P. . . .	Solicitor-General.
Sir H. J. Johnson, President of the Law Society.	

ELECTED MEMBERS.

P. Ogden Lawrence, Esq., K.C. A. R. Kirby, Esq.	Lincoln's Inn.
Sir F. A. Bosanquet, K.C. H. F. Dickens, Esq., K.C.	Inner Temple.
J. M. Astbury, Esq., K.C. C. C. Scott, Esq., K.C.	Middle Temple.
J. C. Lewis Coward, Esq., K.C. H. E. Duke, Esq., K.C., M.P.	Gray's Inn.
W. English Harrison, Esq., K.C., of the Middle Temple. Robert F. Norton, Esq., K.C., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
W. Melmoth Walters, Esq. (Firm—Messrs. Walters & Co.). J. W. Budd, Esq. (Firm—Messrs. Budd, Johnson & Jecks).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

1911.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*

ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal	W. COWELL DAVIES, H. B. HEMMING, G. A. STREETEN,	*Barristers-at-Law.*
Mr. Justice Joyce AND Mr. Justice Eve	R. MORRISON, GEORGE MACAN, ARTHUR LAWRENCE,	*Barristers-at-Law.*
Mr. Justice Swinfen Eady AND Mr. Justice Neville	H. L. FRASER, G. R. ALSTON, J. R. BROOKE,	*Barristers-at-Law.*
Mr. Justice Warrington AND Mr. Justice Parker	FRANK EVANS, H. C. ROPER, W. IVIMEY COOK,	*Barristers-at-Law.*

1911.—VOL. II.

LONDON:

Printed for the Council of Law Reporting

BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.,

And Published

BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

BIBL. LONDIN UNIV.

Earl Loreburn	*Lord Chancellor.*
Lord Alverstone	*Lord Chief Justice of England.*
Sir H. H. Cozens-Hardy	*Master of the Rolls.*
Sir Roland Vaughan Williams Sir J. Fletcher Moulton Sir George Farwell Sir H. B. Buckley Sir W. R. Kennedy	*Lords Justices of the Court of Appeal.*
Sir Samuel T. Evans	*President of the Probate, Divorce, and Admiralty Division.*
Sir Matthew I. Joyce Sir C. Swinfen Eady Sir T. Rolls Warrington Sir R. Neville Sir R. J. Parker Sir H. T. Eve	*Justices of High Court, attached to Chancery Division.*
Sir Rufus D. Isaacs	*Attorney-General.*
Sir J. A. Simon	*Solicitor-General.*

ERRATA.

Page	*Line*	*For*	*Read*
37	3 from bottom	p. 252	§ 252, p. 226.
41	head-note, line 8	secure	reduce.
293	9 from bottom	Dicey on Domicil	Dicey on Conflict of Laws.
297	5 from top		
304	18	1651	1851.
352	6 from bottom	"the Act of 1877"	"the Act of 1774 (14 Geo. 3, c. 78)."
495	head-note, line 21	summer	winter.

	[1911] 1 Ch. 604.	
head-note, line 7	C.	E.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 2, 1911, will be as follows :—

In the First Series,
[1911] 1 Ch. [1911] 2 Ch.

In the Second Series,
[1911] 1 K. B. [1911] 2 K. B. [1911] P.

In the Third Series,
[1911] A. C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Abertillery Urban Council, Andrews *v.* – –(C.A.)	398
Amalgamated Society of Engineers, Wilson *v.* – – –	324
Andrews *v.* Abertillery Urban Council – – –(C.A.)	398
Arnold *v.* Ind, Coope & Co., Ld. *In re* Ind, Coope & Co., Ld. –	223
Ashover Fluor Spar Mines, Ld. *v.* Jackson – – – –	355
Attenborough, Solomon *v.* –	159
Attorney-General, Burghes *v.* –	139
——— *v.* Lewes Corporation – – – –	495

B.

Bartley *v.* Thomas. *In re* Thomas – – – –	389
Beaconsfield Rural Council, Robinson *v.* – –(C.A.)	188
Beebe, Fauntleroy *v.* –(C.A.)	257
Bennett, Cope *v.* – – –	488
Biddulph *v.* Peel. *In re* Peel's Settlement – – – –	165
Bladon, *In re.* Dando *v.* Porter	350
Bristow, Ryde *v.* *In re* Earl of Sheffield – – –(C.A.)	267
Burdett, Stirling *v.* – – –	418
Burghes *v.* Attorney-General –	139
Burnell, Hall *v.* – – –	551
Burniston *v.* White. *In re* Hammond – – – –	342
Burrage, Carshalton Urban Council *v.* – – – –	133

C.

Cabs (Meter), Ld., *In re* – –	557
Carshalton Urban Council *v.* Burrage – – – –	133
"Carvino" Trade Mark, *In re.* Coleman & Co., Ld. *v.* Stephen Smith & Co., Ld. (C.A.)	572

PAGE

Central London Railway Company *v.* City of London Land Tax Commissioners (C.A.) 467
City of London Land Tax Commissioners, Central London Railway Company *v.* (C.A.) 467
Coal and Cannel (Howley Park) Company, London and North Western Railway Company *v.* (C.A.) 97
Cockrell's Estate, *In re* – – 318
Coleman & Co., Ld. *v.* Stephen Smith & Co., Ld. *In re* "Carvino" Trade Mark (C.A.) 572
Coode and Hasell, Weymouth Waterworks Company *v.* – 520
Cope *v.* Bennett – – – 488
Copestake *v.* West Sussex County Council – – – – 331
Copland, Edmondson *v.* – – 301
Crofton, Hudleston *v.* *In re* Horsfall – – – – 63

D.

Dando *v.* Porter. *In re* Bladon 350
Decies, Willoughby *v.* *In re* Willoughby – (C.A.) 581
Dee Estates, Ld., *In re.* Wright *v.* Dee Estates, Ld. (C.A.) 85
————, Wright *v.* *In re* Dee Estates, Ld. (C.A.) 85
de la Rue (Thomas) & Co., Limited and Reduced, *In re* – 361
Devereux, *In re.* Toovey *v.* Public Trustee – – – 545
Dumergue, Knill *v.* – (C.A.) 199

E.

Edmondson *v.* Copland – – 301
Electric Lamp (Pope's) Company's Applications, *In re*– 382
Engineers (Amalgamated Society of), Wilson *v.* – – – 324

F.

Fauntleroy *v.* Beebe –(C.A.) 257
Fisher *v.* Ind, Coope & Co., Ld. *In re* Ind, Coope & Co., Ld. – 223
Fluor Spar (Ashover) Mines, Ld. *v.* Jackson – – – – 355
Ford, Haynes *v.* – (C.A.) 237

G.

Graham-Wigan, *In re* – – 438
Great Central Railway Company *v.* Midland Railway Company 173
Green, *In re.* Green *v.* Meinall 275
——— *v.* Meinall. *In re* Green 275
Gwynne, West *v.* – (C. A.) 1

H,

Hall *v.* Burnell – – – 551
Hammond, *In re.* Burniston *v.* White – – – – 342
Haynes *v.* Ford – (C. A.) 237
Horsfall, *In re.* Hudleston *v.* Crofton – – – – 63
Howley Park Coal and Cannel Company, London and North Western Railway Company *v.* (C. A.) 97
Hudleston *v.* Crofton. *In re* Horsfall – – – – 63

I.

Ind, Coope & Co., Ld., *In re.* Fisher *v.* The Company. Knox *v.* The Company. Arnold *v.* The Company – – – 223

J.

Jackson, Ashover Fluor Spar Mines, Ld. *v.* – – – 355
——— *v.* Leighton. *In re* Lawley – – – – 530
James, *In re.* James *v.* Jones – 348
——— *v.* Jones. *In re* James – 348
Jones, James *v.* *In re* James – 348

K.

PAGE

Knill *v.* Dumergue– –(C.A.) 199
Knox *v.* Ind, Coope & Co., Ld. *In re* Ind, Coope & Co., Ld. – 223

L.

Lacon *v.* Lacon. *In re* Lacon's Settlement – – –(C.A.) 17
Lacon's Settlement, *In re.* Lacon *v.* Lacon – – –(C.A.) 17
Lawford *v.* Pryce. *In re* Pryce (C.A.) 286
Lawley, *In re.* Jackson *v.* Leighton – – – – 530
Layton, Nash *v.* – –(C.A.) 71
Leighton, Jackson *v.* *In re* Lawley – – – – 530
Lewes Corporation, Attorney-General *v.* – – – – 49
Lodge's Patent, *In re* – – 46
London and North Western Railway Company *v.* Howley Park Coal and Cannel Company (C.A.) 97

M.

Manks *v.* Whiteley – – – 448
Maryon-Wilson's Estate, *In re* 58
Meinall, Green *v.* *In re* Green – 275
Meter Cabs, Ld., *In re* – – 557
Midland Railway Company, Great Central Railway Company *v.* – 172
Motor (Orleans) Company, *In re* 41

N.

Nash *v.* Layton – –(C.A.) 71
Norton, *In re.* Norton *v.* Norton – – – – 27
——— *v.* Norton. *In re* Norton 27
Nunburnholme (Lord), *In re.* Wilson *v.* Nunburnholme – 510
———, Wilson *v.* *In re* Lord Nunburnholme – – 510

O.

Orleans Motor Company, *In re* – 41

P.

PAGE

Paul *v.* Piccadilly Hotel, Ld. *In re* Piccadilly Hotel, Ld. – 534
Peel, Biddulph *v.* *In re* Peel's Settlement – – – – 165
Peel's Settlement, *In re.* Biddulph *v.* Peel – – – 165
Piccadilly Hotel, Ld., *In re.* Paul *v.* Piccadilly Hotel, Ld. – 534
———, Paul *v.* *In re* Piccadilly Hotel, Ld. – 534
Plinston, Taylor, Plinston Brothers & Co., Ld. *v.* – – 368
——— *v.* (C.A.) 605
Pope's Contract, *In re* – – 442
Pope's Electric Lamp Company's Applications, *In re* – – 383
Porter, Dando *v.* *In re* Bladon 350
Pryce, *In re.* Lawford *v.* Pryce (C.A.) 286
———, Lawford *v.* *In re* Pryce (C.A.) 286
Public Trustee, Toovey *v.* *In re* Devereux – – – – 545

R.

Rayner *v.* Stepney Corporation – 312
Robinson *v.* Beaconsfield Rural Council – – (C.A.) 188
Ryde *v.* Bristow. *In re* Earl of Sheffield – – (C.A.) 267

S.

Scott, *In re.* Scott *v.* Scott – 374
—— *v.* Scott. *In re* Scott – 374
Sheffield (Earl), *In re.* Ryde *v.* Bristow – – (C.A.) 267
Sly, Spink & Co., *In re* – – 430
Solomon *v.* Attenborough – – 159
Spencer *v.* Willis. *In re* Willis 563
Stephen Smith & Co., Ld., Coleman & Co., Ld. *v.* *In re* "Carvino" Trade Mark (C.A.) 572
Stepney Corporation, Rayner *v.* (C.A.) 312
Stirling *v.* Burdett – – – 418

T.

	PAGE
Taylor, Plinston Brothers & Co., Ld. *v.* Plinston – – –	368
——————— – (C.A.)	605
Tewkesbury Gas Company, *In re.* Tysoe *v.* The Company – – – – –	279
———————, Tysoe *v.* *In re* Tewkesbury Gas Company – – –	279
Thomas, *In re.* Bartley *v.* Thomas – – – –	389
———, Bartley *v.* *In re* Thomas – – – –	389
Thomas de la Rue & Co., Limited and Reduced, *In re* – – – – –	361
Toovey *v.* Public Trustee. *In re* Devereux – – – –	545
Tysoe *v.* Tewkesbury Gas Company. *In re* Tewkesbury Gas Company – – – –	279

W.

	PAGE
Waterworks (Weymouth) Company *v.* Coode and Hasell –	520
West *v.* Gwynne – (C.A.)	1
West Sussex County Council, Copestake *v.* – – –	331
Weymouth Waterworks Company *v.* Coode and Hasell – –	520
White, Burniston *v.* *In re* Hammond – – – –	342
Whiteley, Manks *v.* – –	448
Willis, *In re.* Spencer *v.* Willis	563
———, Spencer *v.* *In re* Willis	563
Willoughby, *In re.* Willoughby *v.* Decies – – –(C.A.)	581
——————— *v.* Decies. *In re* Willoughby – (C.A.)	581
Wilson *v.* Amalgamated Society of Engineers – – –	324
——— *v.* Nunburnholme. *In re* Lord Nunburnholme – –	510
Wright *v.* Dee Estates, Ld. *In re* Dee Estates, Ld. – (C.A.)	85

TABLE OF CASES CITED.

A.

		PAGE
Abergavenny Improvement Commissioners *v.* Straker	42 Ch. D. 83	244
Accles, Ld., In re	[1902] W. N. 164; 51 W. R. 57; 18 Times L. R. 786	534, 540
Adams *v.* Angell	5 Ch. D. 634	452
Alcock, In re	23 Ch. D. 372	304
Alma Spinning Company, In re	16 Ch. D. 681	434
Amalgamated Society of Railway Servants *v.* Osborne	[1910] A. C. 87	324
Anderson, In re	[1911] 1 K. B. 896	229
Andrew *v.* Bridgman	[1908] 1 K. B. 596	1
Anglo-Moravian Hungarian Junction Railway Company, In re	1 Ch. D. 130	559
Anstruther *v.* Adair	2 My. & K. 513	208
Arnold *v.* Dixon	L. R. 19 Eq. 113	261
Ashforth, In re	[1905] 1 Ch. 535	31
Ashton, In re	[1897] 2 Ch. 574; [1898] 1 Ch. 142	167
Attorney-General *v.* Antrobus	[1905] 2 Ch. 188	235
——— *v.* Dorking Union	20 Ch. D. 595	504

B.

Bailey *v.* Birchall	2 H. & M. 371	321
Baker and Selmon's Contract, In re	[1907] 1 Ch. 238	445
——— *v.* Oakes	2 Q. B. D. 171	491
Baker's Settlement Trusts, In re	[1908] W. N. 161	289
Bald, In re	76 L. T. 462	286
Banister, In re	12 Ch. D. 131	394
Bank of New South Wales *v.* O'Connor	14 App. Cas. 273	304
Barnett *v.* Covell	90 L. T. 29	136
Baron *v.* Portslade Urban Council	[1900] 2 Q. B. 588	503
Barraclough *v.* Brown	[1897] A. C. 615	150
Bartlett, In re	16 Ch. D. 561	389
——— *v.* Franklin	36 L. J. (Ch.) 671; 15 W. R. 1077	301, 308
Bateman (Baroness) and Parker's Contract, In re	[1899] 1 Ch. 599	136
Bellerby *v.* Rowland & Marwood's Steamship Company	[1902] 2 Ch. 14	435
Belmore (Countess of) *v.* Kent County Council	[1901] 1 Ch. 873	336
Berridge *v.* Ward	10 C. B. (N.S.) 400	469
Biggs *v.* Evans	[1894] 1 Q. B. 88	161

		PAGE
Birch *v.* Birch	8 P. D. 163	208
Birchall *v.* Pugin	L. R. 10 C. P. 397	320
Birmingham Corporation *v.* Foster	70 L. T. 371	241
Blackwell *v.* Pennant	9 Hare, 551	268
Blight *v.* Hartnoll	19 Ch. D. 294	31
Boddington, In re	25 Ch. D. 685	345
Bolingbroke (Lord) *v.* Swindon Local Board	L. R. 9 C. P. 575	194
Booth *v.* Dean	1 My. & K. 560	268
Born, In re	[1900] 2 Ch. 433	557
Borthwick *v.* Elderslie Steamship Company	[1905] 2 K. B. 516	355
Bovill *v.* Endle	[1896] 1 Ch. 648	305
Bowles, In re	[1905] 1 Ch. 371	31
Breslin *v.* Waldron	4 Ir. Ch. Rep. 333	269
Brickenden *v.* Williams	L. R. 7 Eq. 310	296
Brigstocke *v.* Brigstocke	8 Ch. D. 357	20, 352
Bristow *v.* Boothby	2 S. & S. 465	36
British and American Trustee and Finance Corporation *v.* Couper	[1894] A. C. 399	363
British Empire Match Company, In re	59 L. T. 291	434
Brocklesby *v.* Temperance Permanent Building Society	[1895] A. C. 173	161
Brown *v.* Dunstable Corporation	[1899] 2 Ch. 378	505
Browne *v.* Black	[1911] W. N. 68; [1911] 1 K. B. 975	146
Buchanan *v.* Poppleton	4 C. B. (N.S.) 20	470
Bulley *v.* Bulley	8 Ch. D. 479	321
Burgess *v.* Booth	[1908] 2 Ch. 648	260
Burrell *v.* Egremont (Lord)	7 Beav. 205	463
Butler *v.* Rice	[1910] 2 Ch. 277	454
Butterknowle Colliery Company *v.* Bishop Auckland Industrial Co-operative Company	[1906] A. C. 305	106
Butterley Company *v.* New Hucknall Colliery Company	[1910] A. C. 381	108
Bwllfa and Merthyr Dare Steam Collieries (1891), Ld. *v.* Pontypridd Waterworks Company	[1903] A. C. 426	106

C.

Caledonian Railway Company *v.* Sprot	2 Macq. 449	103
California Fig Syrup Company, In re	[1909] 2 Ch. 99; [1910] 1 Ch. 130	384
Carew *v.* Cooper	4 Giff. 619	208
Carne's Settled Estates, In re	[1899] 1 Ch. 324	445
Carrick *v.* Errington	2 P. Wms. 361; 5 Bro. P. C. 391	374
Carter *v.* Roberts	[1903] 2 Ch. 312	607
Cartwright, In re Goods of	1 P. D. 422	491
Carver *v.* Richards	27 Beav. 488	66
Caspari, In re Goods of	75 L. T. 663	491
Cassella (Leopold) & Co., In re	[1910] 2 Ch. 240	385
Champion, In re	[1893] 1 Ch. 101	567
Chandler *v.* Bradley	[1897] 1 Ch. 315	26
Chapman *v.* Michaelson	[1908] 2 Ch. 612; [1909] 1 Ch. 238	148, 150
——— *v.* Robinson	1 E. & E. 25	335
Charing Cross Bridge Company *v.* Mitchell	4 E. & B. 549	472

		PAGE
Chicago and North West Granaries Company, In re	[1898] 1 Ch. 263	282
Cholmeley School (Wardens of) *v.* Sewell	[1894] 2 Q. B. 906	5
Chorley Corporation *v.* Nightingale	[1906] 2 K. B. 612; [1907] 2 K. B. 637	335
Christiansen's Trade Mark, In re	3 Rep. Pat. Cas. 54	572
Church's Patents, In re	3 Rep. Pat. Cas. 95	53
Clayton *v.* Attorney-General	1 C. P. Coop. temp. Cott. 97	151
Cliff *v.* Wadsworth	2 Y. & C. Ch. 598	305
Clippens Oil Company *v.* Edinburgh and District Water Trustees	[1904] A. C. 64	106
Coggins *v.* Bennett	2 C. P. D. 568	335
Colchester (Lord) *v.* Kewney	L. R. 2 Ex. 253	471
Columbian Fireproofing Company, In re	[1910] 2 Ch. 120	43
Consett Waterworks Company *v.* Ritson	22 Q. B. D. 318	107
Cook *v.* Moylan	1 Ex. 67	227
Cooper's Trusts, In re	[1873] W. N. 87	442
Cope *v.* Crossingham	[1908] 2 Ch. 624; [1909] 2 Ch. 148	150
Cornill *v.* Hudson	8 E. & B. 429	4
Coulman, In re	30 Ch. D. 186	37
Cowell *v.* Edwards	2 Bos. & P. 268	423
Cowley (Earl) *v.* Wellesley	L. R. 1 Eq. 656	20
Coxen *v.* Rowland	[1894] 1 Ch. 406	295
Craythorne *v.* Swinburne	14 Ves. 160	422
Crosbie-Hill *v.* Sayer	[1908] 1 Ch. 866	453
Crosfield (Joseph) & Sons, Ld., In re	[1910] 1 Ch. 130	382
Cundy *v.* Lindsay	3 App. Cas. 459	163
Curtis *v.* Kesteven County Council	45 Ch. D. 504	332

D.

D. *v.* A. & Co.	[1900] 1 Ch. 484	369
Dallmeyer, In re	[1896] 1 Ch. 372	588
Dalton *v.* Angus	6 App. Cas. 740	191
Dartford Brewery Company *v.* Moseley	[1906] 1 K. B. 462	440
Davidson, In re	[1899] 2 Q. B. 103	491
Davies and Kent's Contract, In re	[1910] 2 Ch. 35	31
——— *v.* Humphreys	6 M. & W. 153	422
Davies' Trusts, In re	L. R. 13 Eq. 163	295
Davison *v.* Gill	1 East, 64	472
Dawson *v.* Braime's Tadcaster Breweries, Ld.	[1907] 2 Ch. 359	351
Day *v.* Day	31 Beav. 270	303
Dean *v.* Allen	20 Beav. 1	530
Deare *v.* Attorney-General	1 Y. & C. Ex. 197	149
Debenture Corporation *v.* C. de Murietta & Co., Ld.	Unreported. Palmer's Company Precedents, 10th ed. pt. iii. pp. 737, 738	540
Debenture Corporation *v.* Uttoxeter Brewery, Ld.	April 25, 1895. Unreported. Noted in Palmer's Company Precedents, 10th ed. pt. iii. p. 737	534
D'Este's Settlement Trusts, In re	[1903] 1 Ch. 898	289
D'Eyncourt *v.* Gregory	34 Beav. 36	376
Devonshire (Duke) *v.* Barrow Hæmatite Steel Company	2 Q. B. D. 286	6

		PAGE
Dickin and Kelsall's Contract, In re	[1908] 1 Ch. 213	445
Dixon *v.* Caledonian and Glasgow and South Western Railway Companies	5 App. Cas. 820	105
Dodson, In re	[1908] 2 Ch. 638	261
——— *v.* Sammell	1 Dr. & Sm. 575	530
Doe *v.* Pearsey	7 B. & C. 304	469
Dorchester Corporation *v.* Ensor	L. R. 4 Ex. 335	241
Dreyfus *v.* Peruvian Guano Company	42 Ch. D. 66; 43 Ch. D. 316	356
Du Cros' (W. & G.) Application, In re	28 Rep. Pat. Cas. 413; [1911] W. N. 139	384
Dunn *v.* Vere	19 W. R. 151	553
Durrant *v.* Branksome Urban Council	[1897] 2 Ch. 291	502
Dwyer *v.* Rich	Ir. R. 6 C. L. 144	470
Dyer *v.* Dyer	34 Beav. 504	261
Dyson *v.* Attorney-General	[1911] 1 K. B. 410	140

E.

Earle *v.* Barker	11 H. L. C. 280	39
East India Company *v.* Robertson	12 Moo. P. C. 400	204
Easton *v.* Richmond Highway Board	L. R. 7 Q. B. 69	334
Edwards, In re	63 L. T. 481	567
Egmont's (Earl of) Trusts, In re	[1908] 1 Ch. 821	353
Ellesmere Brewery Company *v.* Cooper	[1896] 1 Q. B. 75	421
Elliot *v.* North Eastern Railway Company	10 H. L. C. 333	103
Elwes *v.* Payne	12 Ch. D. 468	242
Emden *v.* Carte	19 Ch. D. 311	557
Errington *v.* Carrick	2 P. Wms. 361; 5 Bro. P. C. 391	374
Escott *v.* Newport Corporation	[1904] 2 K. B. 369	402
Evans, In re	[1893] 1 Ch. 252	369, 607
——— *v.* Levy	[1910] 1 Ch. 452	1, 148
——— *v.* Oakley	1 Car. & K. 125	334
——— *v.* Walker	3 Ch. D. 211	31
Evelyn *v.* Mirrielees	17 Times L. R. 152	335

F.

Falconer *v.* South Shields Corporation	11 Times L. R. 223	502
Fareham Local Board *v.* Smith	7 Times L. R. 443	404
Farrow's Trade Mark, In re	[1890] W. N. 113; 7 Rep. Pat. Cas. 260	576
Faure Electric Accumulator Company *v.* Phillipart	58 L. T. 525	435
Fearon *v.* Mitchell	L. R. 7 Q. B. 690	241
Ferrao's Case	L. R. 9 Ch. 355	44
Field *v.* Thorne	20 L. T. 563	334
Finchley Electric Light Company *v.* Finchley Urban Council	[1903] 1 Ch. 437	403
Fisher, Ex parte	L. R. 7 Ch. 636	44
——— In re	[1894] 1 Ch. 53, 450	440
Fitzgerald, In re	[1904] 1 Ch. 573	208
Fletcher *v.* Great Western Railway Company	4 H. & N. 242; 5 H. & N. 689	104
Foarde's Patent, In re	9 Moo. P. C. 376	52
Foster *v.* Foster	1 Ch. D. 588	261
——— *v.* Warblington Urban Council	[1906] 1 K. B. 648	507

		PAGE
Fox *v.* Fox	L. R. 19 Eq. 286	512
Francis *v.* Francis	2 D. M. & G. 73; 5 D. M. & G. 108	89
Fuente's Trade Marks, In re	[1891] 2 Ch. 166	576

G.

Gardner *v.* Lucas	3 App. Cas. 582	7
Gaussen *v.* Whatman	93 L. T. 101	352
General Provident Assurance Company, In re	38 L. J. (Ch.) 320	434
Gent and Eaton's Contract, In re	[1905] 1 Ch. 386	445
George Routledge & Sons, Ld., In re	[1904] 2 Ch. 474	453
Gerard (Lord) and London and North Western Railway Company	[1895] 1 Q. B. 459	107
Gifford, Ex parte	6 Ves. 805	421
Glasgow (Lord Provost and Magistrates of) *v.* Farie	13 App. Cas. 657	108
Glossop *v.* Heston and Isleworth Local Board	12 Ch. D. 102	504
Godfrey's Case	1 Leach, 287	242
Governments Stock and Other Securities Investment Company *v.* Manila Railway Company	[1897] A. C. 81	229
Gramophone Company's Application, In re	[1910] 2 Ch. 423	385
Grand Junction Waterworks Company *v.* Hampton Urban Authority	[1898] 2 Ch. 331	140, 151
Gray *v.* Bonsall	[1904] 1 K. B. 601	3
Great Eastern Railway Company *v.* Hackney Board of Works	8 App. Cas. 687	470
Great Western Railway Company *v.* Bennett	L. R. 2 H. L. 27	97
——— *v.* Fisher	[1905] 1 Ch. 316	357
Greaves, In re	18 Ch. D. 551	348
Greenwood *v.* Sutcliffe	[1892] 1 Ch 1	305
Greer *v.* Young	24 Ch. D. 545	320
Greet *v.* Greet	5 Beav. 123	512
Greswold *v.* Marsham	2 Ch. Cas. 170	461
Griffith-Boscawen *v.* Scott	26 Ch. D. 358	63
Guy *v.* Churchill	35 Ch. D. 489	557
Gyles *v.* Hall	2 P. Wms. 378	304

H.

Hackney and Lamberhurst Tithe Commutation Rent-charges, In re	E. B. & E. 147	471
Hadley, In re	[1909] 1 Ch. 20	286
Hague *v.* Doncaster Rural Council	73 J. P. 69	507
Haigh *v.* West	[1893] 2 Q. B. 19	482
Hailstone, In re	[1909] P. 118	491
Haines *v.* Roberts	7 E. & B. 625	106
Hall & Co. *v.* Trigg	[1897] 2 Ch. 219	607
Hamilton's (Duke of) Trustees *v.* Caledonian Railway Company	7 F. 847	106
Hancock *v.* Watson	[1902] A. C. 14	39
Hanson *v.* Graham	6 Ves. 239	512
Hardaker *v.* Idle District Council	[1896] 1 Q. B. 335	190

		PAGE
Hare *v.* Putney Overseers	7 Q. B. D. 223	470
Hargreaves, In re	86 L. T. 43; 88 L. T. 100	588, 596
Harrington (Earl) *v.* Derby Corporation	[1905] 1 Ch. 205	504
——— *v.* Ramage	[1907] W. N. 137	393
Harrogate Estates, Ld., In re	[1903] 1 Ch. 498	44
Hartop *v.* Hoare	3 Atk. 44	163
Harvey, In re	39 Ch. D. 289	32
——— *v.* Harvey	26 Ch. D. 644	368, 607
——— *v.* Truro Rural Council	[1903] 2 Ch. 638	335
Head's Trustees and Macdonald, In re	45 Ch. D. 310	444
Henderson *v.* Henderson's Trustees	37 S. L. R. 976	570
Hill, In re	33 Ch. D. 266	557
—— *v.* Rowlands	[1897] 2 Ch. 361	303
Hoare *v.* Parker	2 T. R. 376	160
Hobart *v.* Southend Corporation	75 L. J. (K.B.) 305	507
Hodge *v.* Attorney-General	3 Y. & C. Ex. 342	149
Hodges *v.* Lawrance	18 J. P. 347	474
Hodgson *v.* Pearson	31 L. T. 679	470
Holliday *v.* Wakefield Corporation	[1891] A. C. 81	107
Hood *v.* Phillips	3 Beav. 513	453
Hooper *v.* Bourne	5 App. Cas. 1	101
——— *v.* Ramsbottom	4 Camp. 121	160
Hopkins *v.* Hopkins	1 Atk. 581	377
——— *v.* Worcester and Birmingham Canal Proprietors	L. R. 6 Eq. 437	282
Hopwood *v.* Hopwood	7 H. L. C. 728	169
Horne (W. C.) & Sons, Ld., In re	[1906] 1 Ch. 271	322
Hoskins' Trusts, In re	6 Ch. D. 281	295
Howard's Case	Foster, 77	242
Howe *v.* Smith	27 Ch. D. 89	551
Huguenin *v.* Baseley	14 Ves. 273	464
Hunloke's Settled Estates, In re	[1902] 1 Ch. 941	19
Hunt *v.* Duckworth	39 J. P. 168	227
Hyam *v.* Terry	29 W. R. 32	572
Hyett *v.* Mekin	25 Ch. D. 735	260

I.

Illingworth *v.* Houldsworth	[1904] A. C. 355	229
Imray *v.* Oakshette	[1897] 2 Q. B. 218	3
Ind, Coope & Co. *v.* Hamblin	81 L. T. 779	136

J.

Jackson, In re	25 Ch. D. 162	588
——— *v.* De Kadich	[1904] W. N. 168	551
——— *v.* Woolley	8 E. & B. 778	4
——— & Bassford, Ld., In re	[1906] 2 Ch. 467	44
Jary *v.* Barnsley Corporation	[1907] 2 Ch. 600	107
Jenkins *v.* Hope	[1896] 1 Ch. 278	328
——— *v.* Price	[1907] 2 Ch. 229	1, 148
Johnson, In re	68 L. T. 20	375
Jones, In re	31 Ch. D. 440	541
—— *v.* Liverpool Corporation	14 Q. B. D. 890	191
—— *v.* Llanrwst Urban Council	[1911] 1 Ch. 393	504
—— *v.* Maggs	9 Hare, 605	170
—— *v.* Ogle	L. R. 8 Ch. 192	8

		PAGE
Jones *v.* Turnbull	2 M. & W. 601	557
Joseph Crosfield & Sons, Ld., In re	[1910] 1 Ch. 130	382

K.

Keane *v.* Reynolds	2 E. & B. 748	335
Kenrick & Jefferson, Ld., In re	28 Rep. Pat. Cas. 45	575
Kent *v.* Freehold Land and Brick-making Company	L. R. 4 Eq. 588; 3 Ch. 493	561
Kettlewell *v.* Watson	21 Ch. D. 685; 26 Ch. D. 502	454
Kingsbury *v.* Walter	[1901] A. C. 187	588
Kinnaird *v.* Trollope	42 Ch. D. 610	304
Kirk *v.* Reg.	L. R. 14 Eq. 558	151
Knight *v.* Landport Drainage Board	[1898] 1 Q. B. 588	470
——— *v.* Lee	[1893] 1 Q. B. 41	7
Kong Magnus, The	[1891] P. 223	356

L.

Lacon's Settlement, In re	[1911] 2 Ch. 17	352
Lamb *v.* Attenborough	8 Jur. (N.S.) 280	161
Lambert, In re	[1897] 2 Ch. 169	588
Lambeth Overseers *v.* London County Council	[1897] A. C. 625	471
Lamplough *v.* Kent Waterworks Company	[1903] 1 Ch. 575	527
Larocque *v.* Beauchemin	[1897] A. C. 358	44
Lauri *v.* Renad	[1892] 3 Ch. 402	3
Law Guarantee and Trust Society *v.* Mitcham and Cheam Brewery Company	[1906] 2 Ch. 98	351
Lawrence, In re	[1894] 1 Ch. 556	89
Lawson *v.* Wright	1 Cox, 275	418
Lee and Hemingway, In re	24 Ch. D. 669	439
Leigh *v.* Jack	5 Ex. D. 264	470
Lepine *v.* Bean	L. R. 10 Eq. 160	345
Lethbridge *v.* Lethbridge	3 D. F. & J. 523; 4 D. F. & J. 35	566
Letts *v.* Hutchins	L. R. 13 Eq. 176	304
Lever *v.* Pearce	[1888] W. N. 105	422
Lightbound *v.* Higher Bebington Local Board	16 Q. B. D. 577	136
Liquidation Estates Purchase Company *v.* Willoughby	[1896] 1 Ch. 726; [1898] A. C. 321	452
Lister *v.* Bradley	1 Hare, 10	512
Litchfield *v.* Jones	25 Ch. D. 64; 32 W. R. 288	368, 605, 606
Llewellin, In re	[1891] 3 Ch. 145	89
Locke *v.* Lamb	L. R. 4 Eq. 372	512
London and North Western Railway Company *v.* Ackroyd	31 L. J. (Ch.) 588	100
——— *v.* Evans	[1893] 1 Ch. 16	106
——— *v.* Walker	[1903] A. C. 289	105
London Association of Shipowners and Brokers *v.* London and India Joint Docks Committee	[1892] 3 Ch. 242	150
London Corporation *v.* Low	28 W. R. 250	241
London Drapery Stores, In re	[1898] 2 Ch. 684	559
London Joint Stock Bank *v.* Simmons	[1892] A. C. 201	161

		PAGE
Lord *v.* Colvin	2 Dr. & Sm. 82	559
—— *v.* Sydney (Commissioners of City of)	12 Moo. P. C. 473	470
Love *v.* L'Estrange	5 Bro. P. C. 59	512
Lowe, In re	61 L. J. (Ch.) 41	345
Lowen *v.* Kaye	4 B. & C. 3	335
Lucas *v.* Harris	18 Q. B. D. 127	208
Lutton *v.* Rodd	2 Ch. Cas. 206	304

M.

Macdonald, In re	[1888] W. N. 130	422
McHole *v.* Davies	1 Q. B. D. 59	242
M'Leod *v.* Drummond	14 Ves. 353	162
Main *v.* Stark	15 App. Cas. 384	7
Manchester Corporation *v.* Lyons	22 Ch. D. 287	241
—— *v.* New Moss Colliery, Ld.	[1906] 2 Ch. 564; [1908] A. C. 117	102
Manson *v.* Hope	31 L. J. (M.C.) 191	243
Mappin Brothers *v.* Liberty & Co., Ld.	[1903] 1 Ch. 118	470
Marriott *v.* Chamberlain	17 Q. B. D. 154	71
Mason and Taylor, In re	10 Ch. D. 729	89
Massey, In re	L. R. 9 Eq. 367; 18 W. R. 444	557, 561
Mégret, In re	[1901] 1 Ch. 547	286
Mercers' Company, Ex parte	10 Ch. D. 481	439
Mervin, In re	[1891] 3 Ch. 197	588
Metropolitan Railway Company *v.* Fowler	[1893] A. C. 416	469
Micklethwait *v.* Newlay Bridge Company	33 Ch. D. 133	474
Midland Railway Company, In re	34 Beav. 525	567
—— *v.* Great Western Railway Company	L. R. 8 Ch. 841	873
—— *v.* Miles	30 Ch. D. 635; 33 Ch. D. 632	107
—— *v.* Pye	10 C. B. (N.S.) 179	7
—— *v.* Robinson	15 App. Cas. 19	105
Miles *v.* Harford	12 Ch. D. 691	31
Millican *v.* Vanderplank	11 Hare, 136	393
Mills' Estate, In re	34 Ch. D. 24	440
Minchin *v.* Minchin	I. R. 5 Eq. 258	64
Mitchell *v.* Armstrong	17 Times L. R. 495	19
Mocatta *v.* Murgatroyd	1 P. Wms. 393	461
Monckton *v.* Attorney-General	2 Mac. & G. 402	151
Montague *v.* Montague	15 Beav. 565	167
Monypenny *v.* Dering	2 D. M. & G. 145	39
Moon *v.* Durden	2 Ex. 22	4
Moore, In re	[1901] 1 Ch. 691	298
Morrice *v.* Aylmer	L. R. 7 H. L. 717	570
Moss, In re	31 Ch. D. 90	303
—— *v.* Gallimore	1 Doug. 279	223
Murray *v.* Currie	L. R. 6 C. P. 24	194
Mutual Life Assurance Society *v.* Langley	32 Ch. D. 460	230

N.

National Starch Company's Application, In re	[1908] 2 Ch. 698	384

		PAGE
Neaverson *v.* Peterborough Rural Council	[1902] 1 Ch. 557	482
Neeld *v.* Hendon Urban Council	81 L. T. 405	335
Nerot *v.* Burnand	2 Russ. 56	572
Newcastle-upon-Tyne Corporation *v.* Houseman	63 J. P. 85	502
Newport Urban Sanitary Authority *v.* Graham	9 Q. B. D. 183	136
Newton, Chambers & Co. *v.* Hall	[1907] 2 K. B. 446	469
Nickels, In re	[1898] 1 Ch. 630	261
Nixon, In re	1 Dr. & Sm. 575	531
Nixon's Navigation Company, In re	[1897] 1 Ch. 872	361
Noakes *v.* Noakes & Co., Ld.	[1907] 1 Ch. 64	351
Noble *v.* Cass	2 Sim. 343	17
North British Railway Company *v.* Turners, Ld.	6 F. 900	105
North Eastern Marine Engineering Company *v.* Leeds Forge Company	[1906] 1 Ch. 324	148

O.

Offin *v.* Rochford Rural Council	[1906] 1 Ch. 342	148
Ogle *v.* Morgan	1 D. M. & G. 359	268
Olde *v.* Olde	[1904] 1 Ch. 35	553
Oppenheimer *v.* Attenborough & Son	[1908] 1 K. B. 221	161
Ord, In re	12 Ch. D. 22	567
Oriental Bank Corporation, In re	56 L. T. 868	393
Ormerod *v.* Tate	1 East, 464	559
Orr Ewing *v.* Colquhoun	2 App. Cas. 839	470
Osborne *v.* Amalgamated Society of Railway Servants	[1909] 1 Ch. 163; [1910] A. C. 87	328
Otter *v.* Vaux (Lord)	2 K. & J. 650	460
Owen *v.* Faversham Corporation	72 J. P. 404	507
Oxenden *v.* Compton (Lord)	2 Ves. Jun. 69	261

P.

Page *v.* Bennett	2 Giff. 117	7
Pardo *v.* Bingham	L. R. 4 Ch. 735	4
Parsons, In re	45 Ch. D. 51	276
Pasmore *v.* Oswaldtwistle Urban Council	[1898] A. C. 387	502
Pearson *v.* Dolman	L. R. 3 Eq. 315	510
Pease *v.* Jackson	L. R. 3 Ch. 576	453
Pendlebury *v.* Greenhalgh	1 Q. B. D. 36	190
Penny *v.* Wimbledon Urban Council	[1899] 2 Q. B. 72	190
Pentney *v.* Lynn Paving Commissioners	12 L. T. 818	505
Phillips, Ex parte	19 Ves. 118	261
——— *v.* Gutteridge	4 De G. & J. 531	454
——— *v.* Homfray	44 Ch. D. 694; [1892] 1 Ch. 465	357
Pinkus' Patent, In re	12 Jur. 233	53
Plumstead Board of Works *v.* British Land Company	L. R. 10 Q. B. 16	470
Pollock, In re	28 Ch. D. 552	169

		PAGE
Poole *v.* Huskinson	11 M. & W. 827	481
—— *v.* National Bank of China	[1907] A. C. 229	363
Pope *v.* Whalley	6 B. & S. 303	244
Portal and Lamb, In re	30 Ch. D. 50	567
Portsmouth Corporation *v.* Hall	71 J. P. 564	403
Pouey *v.* Hordern	[1900] 1 Ch. 492	236
Poulson *v.* Wellington	2 P. Wms. 533	66
Pountney *v.* Clayton	11 Q. B. D. 820	107
Poyser, In re	[1908] 1 Ch. 828	588
Price, In re	[1900] 1 Ch. 442	289
—— *v.* Jenkins	5 Ch. D. 619	532
"Primus" Trade Mark, In re	[1910] 2 Ch. 64	578
Property Exchange, Ld. *v.* Wandsworth Board of Works	[1902] 2 K. B. 61	403
Pryer *v.* Petre	[1894] 2 Ch. 11	470
Pulman *v.* Meadows	[1901] 1 Ch. 233	541
Pym *v.* Lockyer	5 My. & Cr. 29	167

Q.

Quarman *v.* Burnett	6 M. & W. 499	190
Quicke's Trusts, In re	[1908] 1 Ch. 887	352
Quilter *v.* Mapleson	9 Q. B. D. 672	7

R.

Ravensworth, In re	[1905] 2 Ch. 1	267
Reedie *v.* London and North Western Railway Company	4 Ex. 244	193
Rees, In re	17 Ch. D. 701	596
——, In the Goods of	[1896] W. N. 57	488
Reg. *v.* Berger	[1894] 1 Q. B. 823	336
—— *v.* East Mark Tithing (Inhabitants)	12 Jur. 332	481
—— *v.* Land Tax Commissioners	2 E. & B. 694	471
—— *v.* ——	58 J. P. 446	471
—— *v.* Prosser	11 Beav. 306	151
—— *v.* Ramsden	E. B. & E. 949	335
—— *v.* Strand Board of Works	4 B. & S. 526	482
—— *v.* Wilson	18 Q. B. 348	405
Reid *v.* Reid	31 Ch. D. 402	7
Rex *v.* Carshalton (Inhabitants)	Unreported	487
—— *v.* Edmonton (Inhabitants)	1 Moo. & R. 24	481
—— *v.* Landulph (Inhabitants)	1 Moo. & R. 393	474
—— *v.* Mitcham (Inhabitants)	Caldecott, 276	471
—— *v.* St. Luke's Hospital	2 Burr. 1053	487
Richmond *v.* White	12 Ch. D. 361	540
Robbins *v.* Whyte	[1906] 1 K. B. 125	230
Rodes, In re	[1909] 1 Ch. 815	19
Rogers *v.* Humphreys	4 Ad. & E. 299	223
Rolls *v.* St. George the Martyr, Southwark (Vestry of)	14 Ch. D. 785	470
Rourke *v.* Robinson	[1911] 1 Ch. 480	303
Ruabon Brick and Terra Cotta Company *v.* Great Western Railway Company	[1893] 1 Ch. 427	105
Ryves *v.* Wellington (Duke)	9 Beav. 579	151

S.

		PAGE
Sadd, In re	34 Beav. 650	89
St. Leonard's, Shoreditch (Vestry) *v.* Phelan	[1896] 1 Q. B. 533	507
Sanderson *v.* Cockermouth and Workington Railway Company	2 H. & Tw. 327	106
Sandrey *v.* Michell	3 B. & S. 405	488
Saunders, In re	[1895] 2 Q. B. 117	208
——— *v.* Vautier	Cr. & Ph. 240	512
Schmarr, In re	[1902] 1 Ch. 326	440
Scholefield, In re	[1905] 2 Ch. 408	289
——— *v.* Templer	John. 155	454
Scott *v.* Horner	60 L. J. (Ch.) 238	393
——— *v.* Tyler	2 Bro. C. C. 431; 2 Dick. 712	162
Scottish Petroleum Company, In re	23 Ch. D. 413	434
Secretary of State for India *v.* Underwood	L. R. 4 H. L. 580	204
Shannon *v.* Breadstreet	1 Sch. & Lef. 52	20
Sharp, In re	45 Ch. D. 286	570
Shelfer *v.* City of London Electric Lighting Company	[1895] 1 Ch. 287	405
Sidney *v.* Sidney	L. R. 17 Eq. 65	566
Simister's Patent, In re	1 Web. P. C. 721	53
Simpkin *v.* Robinson	45 L. T. 221	471
Simpson *v.* Dendy	8 C. B. (N.S.) 433	480
Singer Manufacturing Company *v.* Clark	5 Ex. D. 37	161
Smeeton *v.* Collier	1 Ex. 457	491
Smith, In re	42 Ch. D. 302	160
———, In re	[1906] 1 Ch. 799	352
——— *v.* Great Western Railway Company	3 App. Cas. 165	101
——— *v.* Humble	15 C. B. 321	471
——— *v.* Manners	5 C. B. (N.S.) 632	305
——— *v.* Smith	[1891] 3 Ch. 550	304
Snell, In re	6 Ch. D. 105	89
Snowden, Ex parte	17 Ch. D. 44; 50 L. J. (Ch.) 540; 29 W. R. 654; 44 L. T. 830	418, 422
Société Maritime et Commerciale *v.* Venus Steam Shipping Company	9 Com. Cas. 289	151
South Western of Venezuela (Barquisimeto) Railway Company, In re	[1902] 1 Ch. 701	539
Southern Brazilian Rio Grande do Sul Railway Company, In re	[1905] 2 Ch. 78	283
Spargo's Case	L. R. 8 Ch. 407	44
Sprunt *v.* Pugh	7 Ch. D. 567	372
Staniar *v.* Evans	34 Ch. D. 470	89
Steed *v.* Preece	L. R. 18 Eq. 192	261
Steel *v.* South Eastern Railway Company	16 C. B. 550	193
Steele *v.* Midland Railway Company	L. R. 1 Ch. 275	567
Stephens, In re	[1904] 1 Ch. 322	170
Stinson's Estate, In re	[1910] 1 I. R. 13	261

T.

Tait *v.* Lathbury	L. R. 1 Eq. 174	445
Tancred's Settlement, In re	[1903] 1 Ch. 715	167

		PAGE
Tanqueray-Willaume and Landau, In re	20 Ch. D. 465	162
Tasker (W.) & Sons, Ld., In re	[1905] 2 Ch. 587	453
Taylor *v.* Greenhalgh	L. R. 9 Q. B. 487	193
——— *v.* Roe	68 L. T. 213	370
Thompson, In re	[1906] 2 Ch. 199	37
——— *v.* Towne	2 Vern. 319	295
Thorne *v.* Cann	[1895] A. C. 11	452
Tilbury *v.* Silva	45 Ch. D. 98	469
Timmins, In re	[1902] 1 Ch. 176	160
Toulmin *v.* Steere	3 Mer. 210	448
Townsend's Estate, In re	34 Ch. D. 357	375
Trevor *v.* Whitworth	12 App. Cas. 409	435
Tunbridge Wells Corporation *v.* Baird	[1896] A. C. 434	403
Turner *v.* Letts	20 Beav. 185; 7 D. M. & G. 243	90
——— *v.* Walsh	[1909] 1 K. B. 484	228
Twigg's Estate, In re	[1892] 1 Ch. 579	547

V.

Vawdry *v.* Geddes	1 Russ. & My. 203	510
Venn and Furze's Contract, In re	[1894] 2 Ch. 101	162
Vernon, In re	95 L. T. 48	375
Verrell's Contract, In re	[1903] 1 Ch. 65	165

W.

Wagstaff, In re	[1907] 2 Ch. 35; [1908] 1 Ch. 162	345
Waite *v.* Jennings	[1906] 2 K. B. 11	5
Wakefield Local Board of Health *v.* Lee	1 Ex. D. 336	136
Wallace *v.* Greenwood	16 Ch. D. 362	261
Waller *v.* Barrett	24 Beav. 413	530
Wandsworth Board of Works *v.* United Telephone Company	13 Q. B. D. 904	403
Ward *v.* Const	10 B. & C. 635	471
——— *v.* Royal Exchange Shipping Company	58 L. T. 174	229
Warner *v.* Jacob	20 Ch. D. 220	304
Watling *v.* Lewis	[1911] 1 Ch. 414	279
Watson, In re	[1884] W. N. 38; 53 L. J. (Ch.) 305	90
——— *v.* Hayes	5 My. & Cr. 125	512
Wenlock (Baroness) *v.* River Dee Company	19 Q. B. D. 155	454
West Riding of Yorkshire Rivers Board *v.* Preston	69 J. P. 1	495
——— *v.* Reuben Gaunt & Sons, Ld.	67 J. P. 183	495
Westminster Corporation *v.* Johnson	[1904] 2 K. B. 737	469
Whinney *v.* Moss Steamship Company	[1910] 2 K. B. 813	229
Whistler, In re	35 Ch. D. 561	162
White, In re	17 L. R. Ir. 223	320
——— *v.* Summers	[1908] 2 Ch. 256	376
White's Charities, In re	[1898] 1 Ch. 659	469

		PAGE
Whiteford, In re	[1903] 1 Ch. 889	596
Whitfield, In re	[1911] 1 Ch. 310	276
Wilcox *v.* Steel	[1904] 1 Ch. 212	241
Williams, In re	[1907] 1 Ch. 180	512
Willoughby Osborne *v.* Holyoake	22 Ch. D. 238	293
Wilson *v.* Anderton	1 B. & Ad. 450	160
——— *v.* Piggott	2 Ves. Jun. 351	66
Wiltshire *v.* Smith	3 Atk. 89	304
Winstanley *v.* North Manchester Overseers	[1910] A. C. 7	471
Wishart *v.* Wyllie	1 Macq. 389	470
Wolmershausen *v.* Gullick	[1893] 2 Ch. 514	422
Worraker *v.* Pryer	2 Ch. D. 109	348
Worthington *v.* Morgan	16 Sim. 547	463
——————— & Co.'s Trade Mark, In re	14 Ch. D. 8	572
Wrexham, Mold and Connah's Quay Railway Company, In re	[1900] 1 Ch. 261	440

Y.

York Tramways Company *v.* Willows	8 Q. B. D. 685	435
Young, In the Goods of	L. R. 1 P. & M. 186	491
——— *v.* Adams	[1898] A. C. 469	7
——— *v.* Ashley Gardens Properties, Ld.	[1903] 2 Ch. 112	8, 151

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

WEST *v.* GWYNNE.

[1910 W. 976.]

C. A.
1910
JOYCE J.
Dec. 20, 21.
1911
Jan. 11, 31.
C. A.
May 2, 3, 10.

Landlord and Tenant—Lease—Covenant not to assign without Consent—Fine for Consent—Lease made before Commencement of Act—Retrospective Construction—Declaratory Order—Costs—Conveyancing and Law of Property Act, 1892 (*55 & 56 Vict. c.* 13), *s.* 3.

Sect. 3 of the Conveyancing and Law of Property Act, 1892, applies to all leases whether executed before or after the commencement of the Act, and, in the absence of express provision to the contrary, engrafts upon every covenant in any such lease against assignment or underletting without consent a proviso that no money shall be payable in respect of such consent. If a lessor refuses to give a consent except upon payment, the lessee is relieved from obtaining his consent and can make a valid assignment or underlease without it; but he is also entitled to bring an action for a declaration to that effect, in which costs will be given him though no relief is asked for beyond the declaration.

Andrew v. *Bridgman* [1908] 1 K. B. 596, followed and affirmed.

Jenkins v. *Price* [1907] 2 Ch. 229, 235, and *Evans* v. *Levy* [1910] 1 Ch. 452, 457, overruled as to costs.

ACTION.

The plaintiffs were assignees of a lease dated July 31, 1874, made between the defendant and certain lessees whereby certain premises at Battersea were demised for the term of 94¼ years from March 25, 1874, at a yearly rent of 640*l.*

The lease contained a covenant by the lessees with the defendant that they, their executors, administrators, and assigns,

C. A. 1911 WEST v. GWYNNE.

should not without the consent in writing of the defendant, his heirs or assigns, at any time during the said term assign, underlet, or part with the possession of the premises thereby demised or any part thereof or the said lease.

The lease also contained a proviso for re-entry if default should be made in the performance of any of the lessees' covenants therein contained and the usual lessor's covenant by the defendant for quiet enjoyment.

In February, 1909, the plaintiffs applied to the defendant for his consent to a proposed underlease of part of the premises for the term of twenty-one years at a rent of 340*l.*, but the defendant replied that he was only prepared to grant the plaintiffs a licence to underlet the said premises on condition that the defendant should thenceforth receive for himself one half of the surplus rental to be obtained by the plaintiffs in respect of the demised premises over and above the rent of 640*l.* payable under the lease.

This action was brought by the plaintiffs for (1.) a declaration that the defendant was not entitled to impose the condition and (2.) a declaration that in the events which had happened the plaintiffs were entitled without any further consent on the part of the defendant to grant the proposed underlease upon the terms approved by the defendant except the said condition.

The only question was whether s. 3 of the Conveyancing and Law of Property Act, 1892 (1), applied to a lease executed before the commencement of the Act.

The action came on for hearing before Joyce J. on December 20, 1910.

Younger, *K.C.*, and *Ward Coldridge*, for the plaintiffs.

Hughes, *K.C.*, and *R. E. Moore*, for the defendant.

(1) Sect. 3: "In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent"

1911. Jan. 31. JOYCE J. In the year 1892 the Legislature was minded to prevent in future the exaction of a fine by the lessor for giving the lessee a licence to assign, and so s. 3 of the Conveyancing and Law of Property Act, 1892, was enacted. [His Lordship read that section, and continued.] The question now raised is whether the operation of this section must not by construction be restricted to cases where the lease was granted after the commencement of the Act.

It was contended on behalf of the lessee that this section was merely an amendment of s. 14 of the Conveyancing and Law of Property Act, 1881, which by the express provision of that Act applies to leases made either before or after the commencement of that Act. It seems to me to be very difficult to make that out. There is no mention or reference in this 3rd section of the Act of 1892 of or to the section which it is said to amend. At all events, I think this argument is not sustainable having regard to the judgment of Rigby L.J. in *Imray* v. *Oakshette* (1) and the decision in *Gray* v. *Bonsall* (2), both of which were cases under s. 4 of the Act of 1892. In the latter case the lease was granted before the commencement of the Act.

On the other hand it was contended that inasmuch as it is not expressly enacted that s. 3 of the Act of 1892 is to apply where the lease is granted before the Act, its operation must on general principles be limited to cases where the lease was not in existence at the date of the Act, and reference was made to the principle enunciated by Lindley M.R. in these terms in *Lauri* v. *Renad* (3): "It is a fundamental rule of English law that no statute should be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary." That statement no doubt is correct, for the Court is reluctant to construe a statute so as to render it retrospective, but a statute may have a retrospective operation though it is not expressly so enacted.

(1) [1897] 2 Q. B. 218, 226. (2) [1904] 1 K. B. 601.
(3) [1892] 3 Ch. 402, 421.

C. A. 1911 WEST v. GWYNNE. Joyce J.

In the present case it is not contended that s. 3 of the Act of 1892 does more than prevent the future exaction of a fine upon granting the necessary consent, this being effected by enacting that as from the date of the commencement of the Act all leases shall be deemed to be subject to the provision mentioned in the section. In other words the lessor shall not in future exact a fine for his assent to an assignment unless it has been expressly stipulated that he should be able to do so. The section does not take away any accrued right of action, nor is there any interference with past transactions, nor does it affect, to my mind, anything which can very aptly be termed a vested right at all. The exacting of this fine for giving the consent may, perhaps, more correctly be called a privilege to require a payment in a certain contingent event than a vested right.

In *Pardo* v. *Bingham* (1) Lord Hatherley L.C. held the 10th section of the Mercantile Law Amendment Act to be retrospective, following *Cornill* v. *Hudson*. (2) He says: "The question is, first, whether there is an inconsistency in holding the 14th section to operate prospectively only, whilst the 10th is to be allowed to act retrospectively; and, secondly, whether on general principles the statute ought, in this particular section, to be held to operate retrospectively, the general rule of law undoubtedly being that, except there be a clear indication either from the subject-matter or from the wording of a statute, the statute is not to have a retrospective construction. That rule was laid down strongly in *Moon* v. *Durden* (3), and the reasons given for the judgment in that case were approved of in *Jackson* v. *Woolley* (4), where it was held that the 14th section was not retrospective. It is remarkable that in the reported judgments in that case there should have been no mention of *Cornill* v. *Hudson* (2), and I have not found any case in which *Cornill* v. *Hudson* (2) has been called in question. The reasons for the decision in that case are certainly very cogent, especially that the statute in some cases would not have any operation for fifty years or more, if it did not extend to persons who were at the time of the passing of the statute residing

(1) (1869) L. R. 4 Ch. 735, 739.
(2) (1857) 8 E. & B. 429.
(3) (1848) 2 Ex. 22, 43.
(4) (1858) 8 E. & B. 778.

beyond the seas. Now, in the very case of *Moon* v. *Durden* (1) Baron Parke did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed, and said that the question in each case was, whether the Legislature had sufficiently expressed an intention. In fact, we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated."

The section with which we have to deal in this case is quite plain to every one but a lawyer. As a matter of fact s. 4 of this Act of 1892, in respect of the question whether it is retrospective or not, appears to me to stand on precisely the same footing as s. 3, and s. 4 has undoubtedly been applied in *Wardens of Cholmeley School* v. *Sewell* (2) without any objection being taken on the ground that the lease upon which the question arose was one executed before the passing of the Act. And s. 14 of the Act of 1881, which is expressly made to apply to leases executed before as well as after the Act, has been applied to cases where not only was the lease executed but the breach of covenant conferring the power to re-enter occurred before the commencement of the Act.

The Legislature, I think, intended to prevent or put an end to something which, rightly or wrongly, was considered an injustice. In regard to that I may refer to what Fletcher Moulton L.J. says in *Waite* v. *Jennings*. (3) Looking at all the circumstances in reference to this enactment, and examining it in the way Lord Hatherley, in *Pardo* v. *Bingham* (4), says the statute must be examined, and considering the express generality of the provision, namely, "in all leases," which I think is the same thing as if the statute had said "in every lease" without making any distinction between leases granted before and leases granted after the passing of the Act, upon the whole I come to the conclusion that this section was intended to apply to every lease, both existing and future, and in effect, as from the commencement of this Act of 1892, and in the absence of an

(1) 2 Ex. 22.
(2) [1894] 2 Q. B. 906.
(3) [1906] 2 K. B. 11.
(4) L. R. 4 Ch. 740.

C. A. 1911 WEST v. GWYNNE. Joyce J

express provision to the contrary, "to engraft," using the words of Cockburn C.J. in *Duke of Devonshire* v. *Barrow Hæmatite Steel Co.* (1), upon every existing lease "a very plain enactment, and to this enactment we must give its proper effect."

In my opinion the objection taken by the defendant in this case, on the ground that the lease was granted before the Act, fails, and the plaintiffs are entitled to a declaratory judgment accordingly. I do not hesitate to follow the course indicated by Cozens-Hardy M.R. in *Andrew* v. *Bridgman* (2), where he says: "On the contrary, the refusal by the lessor to give his consent, except on payment of a fine, relieves the lessee from the necessity of obtaining the lessor's consent, and enables him to ignore the restriction on assignment contained in the lease." Here, on the correspondence, he does refuse his consent, except on payment of a fine, without any other objection. The result of it is that he refuses his consent, except on payment of a fine, and, therefore, in my opinion the plaintiffs are entitled to the declaratory judgment claimed, and the defendant must pay the costs.

R. M.

C. A.

The defendant appealed. The appeal came on for hearing on May 2, 1911.

Hughes, K.C., and *R. E. Moore*, for the appellant. Sect. 3 of the Act of 1892 contains no express provision as to the date of its coming into force, as is the case with many other sections in the Act of 1881, and consequently the usual rule should be applied that the section comes into force only from the date of the Act. The contract between these parties as set out in the lease of 1874 is quite clear and legal, and but for this section a pecuniary consideration for the licence to assign could have been required and enforced.

[BUCKLEY L.J. referred to Woodfall's Landlord and Tenant, 13th ed. p. 659.]

Sect. 3 has not altered this contract, for no section is retrospective unless so expressed. Sect. 3 is not an amendment of any of the sections of the 1881 Act; it is an independent section.

(1) (1877) 2 Q. B. D. 286, 289. (2) [1908] 1 K. B. 598.

The Act of 1881 makes express provision for the application or non-application of various sections to instruments executed before the Act; e.g., s. 3, sub-ss. 9 and 10; s. 6, sub-s. 6; s. 7, sub-s. 8; s. 9, sub-s. 14; s. 10, sub-s. 2; s. 11, sub-s. 2; s. 12, sub-s. 2; s. 13, sub-s. 3; s. 14, sub-s. 9; s. 15, sub-s. 3; s. 16, sub-s. 2.

In the Act of 1882 also special provision is made in several sections on the same point. The Act of 1892 is directed to be read with the other Acts, but no express provision is made for the application to existing documents or the reverse. It is therefore governed by the rule, which is a fundamental principle of English law, that a statute is never to be construed retrospectively unless it expressly so provides: see Baron Rolfe's judgment in *Moon* v. *Durden* (1), where he quotes from Coke, 2nd Inst. p. 292, "Nova constitutio futuris formam imponere debet, non præteritis." *Knight* v. *Lee* (2) and *Gardner* v. *Lucas* (3) are instances of the rule which is also laid down in Maxwell's Interpretation of Statutes, 4th ed. p. 322, and was admitted to be the general rule in *Page* v. *Bennett* (4), though in that case the Act, which gave power to relieve against forfeiture, was held to apply to existing leases.

[KENNEDY L.J. referred to *Quilter* v. *Mapleson.* (5)]

That was a case under s. 14 of the Act of 1881, which is expressly made to apply to existing leases, and it was hardly an extension to apply it where the breach, in respect of which forfeiture was attempted, was committed before the Act. Jessel M.R. clearly stated the general rule. It is also stated by Lord Selborne in *Main* v. *Stark* (6), and by Lord Watson in *Young* v. *Adams* (7), where he quotes with approval a statement of Erle C.J. in *Midland Ry. Co.* v. *Pye* (8) that it "manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment." In *Reid* v. *Reid* (9) the principle was applied to the Married

(1) 2 Ex. 22, 32.
(2) [1893] 1 Q. B. 41.
(3) (1878) 3 App. Cas. 582.
(4) (1860) 2 Giff. 117.
(5) (1882) 9 Q. B. D. 672.
(6) (1890) 15 App. Cas. 384, 388.
(7) [1898] A. C. 469, 476.
(8) (1861) 10 C. B. (N.S.) 179, 191.
(9) (1886) 31 Ch. D. 402, 408.

C. A. 1911
WEST v. GWYNNE.

Women's Property Act, and in *Lauri* v. *Renad* (1) to the Copyright Acts. This Act was not intended to interfere with vested rights; the lessor had a vested right to exact a payment for giving his consent, and it makes no difference that the occasion for exercising the right had not arisen before the Act.

The principle applies more strongly in a case where the effect of making the Act retrospective would be to alter existing documents: *Jones* v. *Ogle*. (2) The proviso in this Act is only to apply when there is no express provision to the contrary. That makes it impossible to construe it as applying to existing leases, for the Legislature cannot have intended that existing lessors should be in a worse position than future lessors, as they would be if the latter had a power of contracting out of the section which those whose leases were in existence had not.

As to the remedy, *Waite* v. *Jennings* (3) and *Andrew* v. *Bridgman* (4) shew that the refusal to give consent except on payment gives the lessee no right of action against the lessor. In *Young* v. *Ashley Gardens Properties, Ld.* (5) this Court held a declaratory order ought to be made in such a case, but it has been decided that where a lessee only asks for a declaration and no other relief he is not entitled to costs: *Jenkins* v. *Price* (6); *Evans* v. *Levy*. (7) [They also referred to Woodfall's Landlord and Tenant, 18th ed. p. 750.]

[COZENS-HARDY M.R. If we come to the conclusion that we ought to make a declaratory order we are all of opinion that the costs should follow the event.]

Younger, K.C., and *Ward Coldridge*, for the respondents. All the cases cited for the appellant shew that the rule referred to only applies where the construction of an Act is ambiguous. Where on the fair construction of the Act it shews a clear intention to deal with existing rights it will be held to do so. The intention need not be expressed in so many words. Taking this section by itself, the words "In all leases" naturally include existing leases, and if they were not intended to be included some words

(1) [1892] 3 Ch. 402.
(2) (1872) L. R. 8 Ch. 192.
(3) [1906] 2 K. B. 11.
(4) [1908] 1 K. B. 596.
(5) [1903] 2 Ch. 112.
(6) [1907] 2 Ch. 235.
(7) [1910] 1 Ch. 452.

indicating futurity would have been added. There are good reasons for thinking that the Legislature meant the section to apply to existing leases, for it is part of a series of enactments in relief of lessees, all of which apply to existing leases. The answer to the argument from the power of contracting out given to future lessors is to be found in the judgment of Fletcher Moulton L.J. in *Andrew* v. *Bridgman* (1): "The Legislature declares that the power to refuse consent to assign is not to be made a source of profit to the lessor." That was not the primary or proper purpose of the covenant, and the Legislature intended to prevent the landlord using it for a purpose not in the contemplation of the parties. The Act only deprived him of a power, which in the view of the Legislature he ought not to use.

In the Acts of 1881 and 1882 wherever there is a provision relating to documents there is a special declaration that it shall or shall not apply to existing documents. In the Act of 1892 there are no such declarations. The reason appears to be that ss. 2 to 5 are all dealing with the same subject-matter as s. 14 of the Act of 1881 and are to be read with it. Now s. 14 is expressly made to apply to existing leases, and though Rigby L.J. decided in *Imray* v. *Oakshette* (2) that s. 3 of the Act of 1892 cannot be read merely as an amendment of s. 14 of the Act of 1881, they are to be read together, and the fact that the first is made to apply to existing leases throws some light on the intention in the second.

Sect. 4 of the Act of 1892 was held to apply to existing leases in *Wardens of Cholmeley School* v. *Sewell.* (3)

Moon v. *Durden* (4) and *Knight* v. *Lee* (5) were cases under the Gaming Acts where there was an existing debt lawfully incurred and owing before the commencement of the Act.

Gardner v. *Lucas* (6) and *Young* v. *Adams* (7) were not decided on any general rule of law, but on the construction of the words of the particular Act. In *Reid* v. *Reid* (8) Bowen L.J. expressly says that the rule of construction on which the appellant relies

(1) [1908] 1 K. B. 599.
(2) [1897] 2 Q. B. 218.
(3) [1894] 2 Q. B. 906, 911.
(4) 2 Ex. 22.
(5) [1893] 1 Q. B. 41.
(6) 3 App. Cas. 582.
(7) [1898] A. C. 469.
(8) 31 Ch. D. 408.

C. A. 1911 WEST v. GWYNNE.

only applies where the words of a statute are ambiguous. In this case they are clear. In *Duke of Devonshire* v. *Barrow Hæmatite Steel Co.* (1) the Court applied a subsequent Act so as to alter the natural construction of an existing lease.

R. E. Moore in reply.

May 10. COZENS-HARDY M.R. This appeal raises an important question, whether s. 3 of the Conveyancing Act, 1892, is of general application, or whether its operation is confined to leases made after the commencement of the Act. That section enacts that "in all leases" containing a covenant against assigning or underletting without licence or consent, such covenant shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine shall be payable for or in respect of such licence or consent. Joyce J. has held that the section is of general application, and I agree with his view. I arrive at this conclusion for several reasons. In the first place, the language of the section is perfectly general, "in all leases," and there is nothing in the section itself to confine it to leases subsequent to the Act. In the second place, ss. 2, 4, and 5 of the Act are plainly general, for they are amendments of s. 14 of the Conveyancing Act, 1881, which by sub-s. 9 is expressly declared to be general; and it would be strange that the interposed s. 3 should not also be general. In truth, s. 3 does indirectly affect the question of forfeiture which is dealt with by s. 14, and may well be treated as amending that section. In the third place, the Legislature appears to have regarded the exaction of a fine as the price of consent to an assignment as so unreasonable that it ought not to be deemed to have been part of the bargain unless expressly mentioned in the lease itself. This is a question of general policy equally applicable to all leases.

I do not forget the words "unless the lease contains an expressed provision to the contrary"—words which it is urged point to the future. But those words are not inapplicable to the past, and precisely similar words are found in s. 46 of the Settled Estates Act, 1877, empowering a tenant for life to grant certain

(1) 2 Q. B. D. 286.

leases "unless the settlement shall contain an express declaration" to the contrary. It was forcibly argued by Mr. Hughes that a statute is presumed not to have a retrospective operation unless the contrary appears by express language or by necessary implication. I assent to this general proposition, but I fail to appreciate its application to the present case. "Retrospective operation" is an inaccurate term. Almost every statute affects rights which would have been in existence but for the statute. Sect. 46 of the Settled Estates Act, 1877, above referred to, is a good example of this. Sect. 3 does not annul or make void any existing contract; it only provides that in the future, unless there is found an express provision authorizing it, there shall be no right to exact a fine. I doubt whether the power to refuse consent to an assignment except upon the terms of paying a fine can fairly be called a vested right or interest. Upon the whole I think s. 3 is a general enactment based on grounds of public policy, and I decline to construe it in such a way as to render it inoperative for many years wherever leases for 99 years, or it may be for 999 years, are in existence.

Another point was raised which I shall deal with very shortly. It was conceded that the landlord has declined to give his consent to underletting, except on payment of a fine. It was said by each of the three members of this Court who decided *Andrew* v. *Bridgman* (1) that the effect of such refusal was to relieve the lessee from the necessity of obtaining the lessor's consent. Those observations were not necessary for the decision and may be regarded as mere dicta. But the question now arises for decision, and I adhere to my former view, which was adopted by Joyce J., and I decide accordingly. The appeal must be dismissed with costs.

BUCKLEY L.J. During the argument the words "retrospective" and "retroactive" have been repeatedly used, and the question has been stated to be whether s. 3 of the Conveyancing Act, 1892, is retrospective. To my mind the word "retrospective" is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. Interference

(1) [1908] 1 K. B. 596.

C. A. 1911 WEST v. GWYNNE Buckley L.J

with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law.

Numerous authorities have been cited to us. I shall not travel through them. To my mind they have but little bearing upon this case. Suppose that by contract between A. and B. there is in an event to arise a debt from B. to A., and suppose that an Act is passed which provides that in respect of such a contract no debt shall arise. As an illustration take the case of a contract to pay money upon the event of a wager, or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed, so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective. Such was the point which arose in *Moon* v. *Durden* (1) and in *Knight* v. *Lee*. (2) But if at the date of the passing of the Act the event has not happened, then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A.'s right in an event to become a creditor of B. As matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights. To construe this section I have simply to read it, and, looking at the Act in which it is contained, to say what is its fair meaning.

(1) 2 Ex. 22. (2) [1893] 1 Q. B. 41.

I will first take the section without assistance from the surrounding sections amongst which it is found. It provides that in all leases containing a certain covenant the covenant shall, unless the lease expressly provides to the contrary, be deemed to be subject to a certain proviso. I am asked to read this as if it were not "In all leases" but "In such leases as shall be executed after the commencement of this Act." I see no reason for so doing. "All leases" means, I think, all leases, that is to say, both existing leases and leases to come into existence. The best argument to the contrary which I can find within the section itself lies in the fact that the section does confer upon the subsequent lessor power to contract himself out of the statute, whereas the antecedent lessor would not have had that opportunity. But this is not a consideration which leads me to vary the plain meaning of the words used. It is true that the section affects existing rights as between existing lessors and lessees, but that seems to me to have been its purpose and object.

The view which I have thus expressed becomes the more certain, I think, when the other parts of the Act are looked at. By s. 1 the Act of 1892 is to be read with the Act of 1881. The Act of 1881 contains in ss. 10 to 14 provisions as to leases. Sects. 10, 11, and 12, which are headed "Leases," affect rights as between lessors and lessees, and are expressed to be applicable only to leases made after the commencement of the Act. Sect. 14 affects other rights as between lessors and lessees and is expressed to be applicable to leases made either before or after the commencement of the Act. In s. 14 there is mentioned, for the purpose of excluding it from the operation of the section, a covenant against assignment without licence. The Act of 1881 thus expressed that in the case of leases made either before or after the commencement of the Act a covenant not to assign without licence should be enforceable just as before. Sect. 3 of the Act of 1892 is a section which provides that such a covenant shall not be enforceable just as before, but shall be subject to such proviso as there mentioned. This section is to be read as if it were contained in the Act of 1881, and is dealing with a subject-matter mentioned in the Act of 1881, and as to which there is in that Act a provision that the enactment shall apply to leases made

C. A. 1911 WEST v. GWYNNE. Buckley L.J.

either before or after the commencement of the Act. Further, s. 3 of the Act of 1892 is found under a heading of "Leases, Underleases, Forfeiture," a heading equivalent to that of s. 14 of the Act of 1881, and s. 3 occurs between s. 2 and s. 5, both of which refer to and amend s. 14 of the Act of 1881. Further, s. 3 occurs next before s. 4, which certainly in my opinion applies to leases whether made before or after the commencement of the Act. Sect. 4 begins with the words "Where a lessor is proceeding." That means, I think, any lessor under any lease whether made before or after the commencement of the Act. Sect. 3 commences with the words "In all leases." That, I think, means in like manner leases whether made before or after the commencement of the Act. For these reasons I am of opinion, not that s. 3 is retrospective, but that it is a section which relates to leases whether existing at the date of or executed after the commencement of the Act. It results that it applies to the lease in the present case, which was executed in 1874 and still subsisted in 1892.

It is not in dispute between the parties that the defendant refused to give the licence except upon the terms of receiving pecuniary consideration for it. Under these circumstances the plaintiffs are, I think, entitled to the declaration and injunction which have been granted. As regards the costs, the Court intimated in the course of the discussion that there is no ground for depriving the plaintiffs of their costs. The question in litigation is whether the plaintiffs are entitled to a right in respect of this property which the defendant denied. The plaintiffs are in the right and are entitled to their costs of the action, and this appeal must be dismissed with costs.

KENNEDY L.J. I concur with the other members of the Court in the dismissal of this appeal. I think that, upon the whole, the view which Joyce J. has adopted is preferable to that for which the counsel for the appellant have contended, in regard to applicability of s. 3 of the Conveyancing Act, 1892, to the present case. The question is whether that section ought or ought not to have effect in regard to a lease made in July, 1874. I agree with the appellant's counsel and with Joyce J. (who

refers to a judgment of Rigby L.J. to the like effect) that the question cannot rightly be decided by treating the section as merely an enactment which amends and is to be read with, or into, s. 14 of the Act of 1881, as to which, by the express terms of the last-named section, the Legislature has prescribed that it is to be held applicable to leases made before as well as after the commencement of that Act. I also agree with the appellant's counsel that, if this s. 3 of the Act of 1892 is applied to a lease made before the statute came into force, the lessor finds himself to some extent in a worse position than an owner of property who is bargaining with a proposed lessee about the terms of a lease of his property after the statute has come into force, and who knows by the terms of this enactment that if he desires to have the right of insisting upon a fine, or upon a payment in the nature of a fine, as a condition of assenting to his tenant's proposal to assign or underlet, he must have that right expressly stated in the lease under discussion. It appears to me that the argument founded upon this consideration was the best that could be put forward in support of the appellant's case. And, thirdly, I recognize the existence and the justice of the general rule of English law which is summarized by Sir Peter Maxwell in his work on the Interpretation of Statutes, 4th ed. p. 322, and is illustrated in his text and notes, as it was in the course of the argument of counsel in this Court, by a long line of cases, "that no statute shall be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

I do not think this is a very clear case; but after giving, as I hope, due weight to all the foregoing considerations, I have come to the conclusion that the decision in the Court below ought to be upheld.

In the first place, it appears to me that the language of the section, though it does not exclude the contention of the appellant, favours the wider interpretation. The opening words, "in all leases," prima facie negative a distinction between leases made before and leases made after the passing of the Act. Nor is there anything in the context to prevent or modify this

C. A. 1911 WEST v. GWYNNE. Kennedy L.J.

inference. In order to give the section the limited application for which the appellant contends, you must add by implication after the words "all leases" some such words as "made after the passing of this Act."

In the next place, if effect is given to the section in relation to leases already existing, it will not operate either to destroy or impair the validity of those leases, or to take away any "vested right," as I understand the phrase, under them. Where the lease, as in the present case, contains an absolute restriction upon assignment without the consent of the lessor having first been obtained, the force of the restriction itself remains unaffected. All that the section does is by a statutory implication to prevent the lessor from so using, or, as the Legislature seems to deem it, abusing, the restriction as to refuse his consent except upon the one condition of the lessee's agreeing to give him a pecuniary consideration for that consent. I do not think that an enactment which prevents the lessor from availing himself of the lessee's covenant not to assign without licence as an indirect instrument of profit falls properly within the category of enactments which take away either vested rights or the legal character of a past transaction, or which impair an existing contract, and it is chiefly to such enactments that the rule "nova constitutio futuris formam imponere debet, non præteritis" has been applied by the Courts in the series of cases to which I have already referred. None of the decisions cited to us come, in the subject-matter, very near to the subject-matter of the present case. The nearest, perhaps, which I have been able to find is *Page* v. *Bennett* (1), heard by Stuart V.-C., where the Court of Equity exercised a jurisdiction, given by the 22 & 23 Vict. c. 35, to relieve against forfeiture in consequence of a breach of the covenant to insure, in a case where the breach occurred after the passing of the Act, but the lease had been made before that date. So far as it goes, the judgment in that case is in favour of the present respondents. And, if one is permitted, in ascertaining the intention of the Legislature in this 3rd section, which is in its terms naturally susceptible of a general and unlimited application, to weigh the comparative advantage or disadvantage

(1) 2 Giff. 117.

C. A. 1911 WEST v. GWYNNE. Kennedy L.J.

to the community of the one interpretation or the other, it may, as it appears to me, fairly be contended that the one possible disadvantage to lessors under existing leases, as compared with lessors under future leases to which I have already referred, is more than counterbalanced by the advantage of a presumably just alteration in the interpretation of the vast number of existing leases.

The declaration asked for by the plaintiffs and granted by Joyce J. is, according to the opinion expressed by this Court on previous occasions, the natural corollary of his decision upon the applicability of the 3rd section of the Act.

I see no reason why the plaintiffs should not have their costs.

Solicitors : *Johnstone & Wiley; Reed & Reed.*

J. R. B.

C. A. 1911 *May* 9, 26.

In re LACON'S SETTLEMENT. LACON *v.* LACON.

[1910 L. 321.]

Settled Land—Mansion House—Capital or Income—Lease by Tenant for Life—Repairing Covenants—Breach—Dilapidations—Damages—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 53.

Where a tenant for life without impeachment of waste recovers damages from a lessee for dilapidations to the mansion house and buildings arising from breaches of repairing covenants in a lease granted by a previous tenant for life under the statutory power, the damages are not capital moneys payable to the trustees of the settlement or into Court, but must be taken to represent the damages which the tenant for life has sustained (*Noble* v. *Cass* (1828) 2 Sim. 343), and may accordingly be kept by him and used for such purposes as he may think fit.

Decision of Swinfen Eady J., [1911] 1 Ch. 351, reversed.

Appeal from a decision of Swinfen Eady J. (1) which raised the question whether the trustees of a settlement or the tenant for life were entitled to moneys paid in respect of dilapidations by a lessee of the mansion house under a lease granted by a former tenant for life under the Settled Land Act, 1882.

(1) [1911] 1 Ch. 351.

C. A. 1911

LACON'S SETTLEMENT, *In re.* LACON *v.* LACON.

The documents are set out in greater detail in the report of the case in the Court below, but the following summary is sufficient for the purposes of this report.

By the will of Sir Edmund Lacon, who died in September, 1888, the mansion house known as Ormesby House, in the parish of Ormesby St. Margaret, Norfolk, with certain other messuages, farms, lands, and hereditaments, was settled upon the testator's sons and their issue in strict settlement, the tenants for life being made unimpeachable for waste. Certain chattels were also settled to devolve as heirlooms with the settled estates.

By a lease dated December 28, 1888, the testator's eldest son, the late Sir Edmund Lacon, as tenant for life under the Settled Land Acts, and with the consent of the trustees of the testator's will, demised the mansion house for a term of twenty-one years from October 11, 1888, at a rent of 300*l.* per annum. By the same indenture the lessor also purported to let the settled furniture for the same period, but such last-mentioned letting was not authorized by the Settled Land Acts. By the same indenture the lessee covenanted to keep the mansion house, erections, and buildings in good and substantial repair, and more particularly as therein mentioned. He also covenanted to preserve the household goods and furniture, reasonable wear and tear thereof excepted.

The lessor, the said Sir Edmund Lacon, died on August 11, 1899, without having had any issue, and thereupon his nephew, the defendant, became tenant for life, without impeachment of waste, of the settled property. The lease expired on October 11, 1909, and thereupon a claim was made against the representative of the lessee for damages for breach of covenant.

The claim was as follows:—(1.) Dilapidations to buildings, 881*l.*; (2.) chattels damaged or missing, 228*l.* 11*s.* 6*d.*; (3.) loss of rent during half a year while premises were being repaired, 150*l.*; and (4.) surveyor's charges, 65*l.*; total, 1324*l.* 11*s.* 6*d.*

A sum of 1000*l.* was ultimately paid to the defendant in settlement of this claim. The summons was issued to determine whether the trustees were entitled to the whole or any part of the 1000*l.* as capital, or whether the defendant could retain it. It was admitted that the 1000*l.* must be apportioned between the

four items of the claim, and that the defendant was entitled to the apportionments on items 3 and 4, and that the balance of item 4 must be repaid to him rateably out of items 1 and 2. It was also admitted that the balance of the apportionment on item 2 belonged to the trustees, and the only question was to whom the balance of item 1 belonged.

Swinfen Eady J. held that the trustees were entitled to the balance of item 1: in his Lordship's opinion damages recovered by a tenant for life for breach of covenants to repair contained in a lease granted under the Settled Land Acts belonged to him as trustee and must therefore be handed over by him to the trustees of the settlement as capital moneys.

The tenant for life appealed.

Buckmaster, K.C., and *T. T. Methold*, for the appellant. The lease was granted under the statutory power given by the Settled Land Act, 1882, s. 7, the consent of the trustees being obtained in accordance with the Settled Land Act, 1890, s. 10. Under the Settled Estates Act, 1877, s. 46, a demise is not to be made without impeachment of waste: this provision is not repeated in the Settled Land Acts, so that a tenant for life can now demise the land for the best rent that can be obtained, regardless, it may be, of any covenants to repair. Trustees for the purposes of the Settled Land Acts have no power to expend capital money in repairs which fall on the tenant for life; damages for dilapidations, therefore, are properly payable to the tenant for life.

There is nothing in s. 53 of the Settled Land Act, 1882, to deprive a tenant for life of these damages. The appellant is absolutely entitled to these damages and is not bound to expend them upon repairing the mansion house; he is tenant for life without impeachment of waste and is entitled to these moneys as casual profit: *Noble* v. *Cass* (1); *In re Hunloke's Settled Estates*. (2) *In re Rodes* (3) was the case of an equitable tenant for life, and in *Mitchell* v. *Armstrong* (4) it does not appear that the tenant for life was unimpeachable for waste; the main point

(1) 2 Sim. 343.
(2) [1902] 1 Ch. 941.
(3) [1909] 1 Ch. 815.
(4) (1901) 17 Times L. R. 495.

C. A. 1911

LACON'S SETTLEMENT, *In re.* LACON *v.* LACON.

in that case was whether the trustees were entitled to join in the receipt.

J. M. Stone, for the respondents, the trustees. It is not necessary to decide whether these damages are or are not capital money; it is, however, money that belongs to or represents the inheritance, and therefore ought to be paid to the trustees and not to the tenant for life. *In re Rodes* (1) is in favour of this contention.

The case is governed by s. 53 of the Settled Land Act, 1882. This was a lease of the mansion house, so that the tenant for life was not an absolutely free agent: he was bound to obtain the consent of the trustees, and the consent of the trustees no doubt was only given because the lease contained proper repairing covenants. If this money is paid to the tenant for life it should only be on the terms that it is laid out in repairs. If the appellant's contention is right, there is nothing to prevent a tenant for life making a bargain with his lessee not to require him to observe the covenants if he will pay him a lump sum down. In *Noble* v. *Cass* (2) the lease was made by the testatrix and not under any power.

Money recovered by a tenant for life in respect of a covenant to repair must be laid out on the estate: Chance on Powers, vol. ii. p. 308; *Shannon* v. *Breadstreet* (3); Gover on Capital and Income, 2nd ed. p. 5; *Mitchell* v. *Armstrong*. (4)

Under the Settled Land Acts the tenant for life is in a fiduciary position and ought not to be allowed to pocket these moneys.

T. T. Methold, in reply, cited *Brigstocke* v. *Brigstocke* (5) and *Earl Cowley* v. *Wellesley*. (6)

Cur. adv. vult.

May 26. COZENS-HARDY M.R., after stating the lease and the facts, continued:—Now the application is solely under the Settled Land Act, the plaintiffs being trustees for the purposes of the Settled Land Acts and the defendant being the tenant for life

(1 [1909] 1 Ch. 815.
(2) 2 Sim. 343.
(3) (1803) 1 Sch. & Lef. 52, 72.
(4) 17 Times L. R. 495.
(5) (1878) 8 Ch. D. 357.
(6) (1866) L. R. 1 Eq. 656.

in possession. The plaintiffs contend, and Swinfen Eady J. has decided, that the sum in question, subject to certain deductions, which are not material, is payable by the defendant to the plaintiffs as capital money. In my opinion this decision cannot be supported. If it is capital money it is plain that it cannot be applied in making good the repairs which the lessee ought to have effected (Settled Land Act, 1882, s. 21), and I fail to appreciate what right the plaintiffs have to this sum. The defendant, as legal reversioner, was entitled to sue at law and claim damages for breach of the covenants, and it seems to me that he sued for his own benefit and is entitled to the amount recovered.

It may not be material to consider whether in an action properly framed the persons interested in remainder could maintain any claim against the defendant, but I think it right to observe that I can see no ground for any such claim. The defendant is tenant for life without impeachment of waste. He is under no obligation to repair. There is no suggestion of wilful waste either by the lessee or by the defendant.

Stress was laid in argument upon s. 53 of the Settled Land Act, 1882, which provides that a tenant for life, in exercising any power under the Act, shall have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties. A tenant for life without impeachment of waste is not bound to repair, and he can grant a lease without imposing any liability to repair upon the tenant, provided the lease takes effect only out of his own life estate. If, however, he is minded to grant a lease for a fixed term, say twenty-one years, which will or may take effect out of estates in remainder, he can only do so by virtue of the powers conferred upon him by the Settled Land Acts. Sect. 53 applies to such a case. I think the trustees might—and indeed ought to—have refused to consent to a lease of the mansion house not containing usual and reasonable covenants to repair. But s. 53 only applies to the exercise of a power under the Settled Land Acts. No one suggests that the lease of 1888 was improper. The appellant is not exercising any power under the Settled Land

C. A. 1911 — LACON'S SETTLEMENT, *In re.* LACON *v.* LACON. — Cozens-Hardy M.R.

Acts, and s. 53 is out of the question. The lease has expired. He is only asserting his legal right of action under a covenant which runs with the land. It is true that no writ was actually issued, the matter having been settled between the parties. But the money with which we are concerned must be taken to represent the damages which he has suffered—*Noble* v. *Cass* (1)—and I see no reason why he should not keep the money and use it as he thinks fit. In my opinion the decision of the learned judge cannot be supported and the appeal must be allowed.

BUCKLEY L.J. In this case two questions arise, namely, first, whether the 881*l.* is payable to the trustees of the settlement effected by the will of 1884, or to the defendant as tenant for life; and, secondly, if the sum be payable to the tenant for life, whether he can at his option lay it out in effecting the repair, or can use it as he thinks proper. The learned judge decided the first question in favour of the trustees of the settlement. In that case the second question did not arise. The 881*l.* is damages for breach of a covenant to repair contained in a lease for twenty-one years, executed in 1888 by the then tenant for life in possession, to whom the defendant has succeeded as tenant for life in possession. Under the settlement the tenant for life was not impeachable for waste. Inasmuch as the lessor was not impeachable for waste he could have granted a lease limited to his own lifetime which did not contain repairing covenants. The tenant for life, however, granted the lease under the powers contained in the Settled Land Act, 1882. It was a lease not limited to his own lifetime. It is noticeable that the Act of 1882 does not repeat the provision of s. 46 of the Settled Estates Act, 1877, by adding the proviso that the demise be not made without impeachment of waste. Nothing, however, turns upon this, for the lessor did introduce into the lease repairing covenants. The tenant did not repair. The 881*l.* has been obtained as the damages for breach, and the order under appeal is one which determines that that sum must be paid to the trustees of the settlement. In their hands it will be capital moneys not capable of being expended without breach of trust

(1) 2 Sim. 343.

in repairing the house. It is difficult to see how such a conclusion can be right. The learned judge founds his opinion upon s. 53 of the Settled Land Act, 1882. Under that section the tenant for life in exercising his powers is bound to have regard to the interests of the remaindermen, and is in the exercise of them to be deemed to be in the position of a trustee for them. Sect. 53 may be said to create a new statutory trust of which the tenant for life is the sole trustee. He is, however, a trustee for the parties interested under the settlement according to their rights as created by the settlement. Sect. 53 does not create in favour of the remaindermen a trust to apply these moneys in a manner in which the settlor has not directed that they shall be applied. If as between the tenant for life and the remaindermen the remaindermen are not entitled to have this sum added as capital moneys to the settled funds, s. 53 has not created any right to have them so applied. The order under appeal is not one which affirms that the moneys must be applied in effecting the repairs, but one which affirms that there must be added to the capital moneys this sum of 881*l.*, with the result that that sum cannot be applied in repair, but must be held upon trust for the tenant for life during his lifetime, and, subsequently, for the remaindermen. Such a result is, I think, quite impossible. There may be cases in which the sum received is such as that as between the tenant for life and remaindermen it ought to be paid by instalments to the persons entitled by way of succession. *In re Rodes* (1) was such a case. But that result is not achieved by paying it as capital money to the trustees of the settlement, and there was in *In re Rodes* (1) no order to that effect. The sum was held in medio to be applied from time to time according to the rights of the parties.

Upon the first question, therefore, I am of opinion that this sum is not payable to the trustees of the settlement, but is payable to the tenant for life.

The next question is whether in the hands of the tenant for life it is a sum which he, as between himself and the remaindermen, is bound to apply in effecting the repairs. So to apply it would no doubt be a proper and reasonable course, but I do not

(1) [1909] 1 Ch. 815.

C. A. 1911

LACON'S SETTLEMENT, *In re.* LACON *v.* LACON.

Buckley L.J.

think the tenant for life is bound so to apply it. It is true that the subject of the demise is the mansion house and that having regard to s. 15 of the Settled Land Act, 1882, which was at the date of this lease in force and is now replaced by s. 10 of the Settled Land Act, 1890, the tenant for life could not demise it without the consent of the trustees, but the trustees could not have demanded as the price of their consent that the tenant for life should pay a further sum to the capital of the settled estate or make any other pecuniary bargain with him. Their consent must be given or withheld for the proper protection of the parties interested in succession under the settlement, having regard to their rights under the settlement. It remains to determine what are their rights in respect of this sum. The tenant for life was not impeachable for waste. He could have granted a lease limited to his own lifetime not containing covenants to repair. If he granted a lease for a term (say twenty-one years) which might extend beyond his own lifetime the trustees could no doubt have refused their consent to the lease if it did not contain such covenants. But no such question arises here. The lease did contain repairing covenants. The present tenant for life, although not the lessor, is a subsequent tenant for life unimpeachable for waste, and as between him and the remaindermen this sum payable in respect of dilapidations under a lease which expired before the remaindermen become entitled in possession is a sum to which they have no claim. For these reasons I think there is no difference by reason of the fact that the premises were the mansion house. The tenant for life executed a lease containing repairing covenants. Had the covenant been complied with, that would have enured for the benefit of all parties interested in succession under the settlement. But the tenant for life was not as between himself and the remaindermen bound to require that it should be complied with, and if he did not the remaindermen would have suffered. Had the remaindermen become entitled in possession during the currency of the lease they might have enforced the covenant. But that event has not happened. When the 881*l.* is paid the contention that the tenant for life must apply it in doing the repair is a contention that under the circumstances he

is bound to do that which the settlor has said he need not do. The settlement is of a property to which the settlor, as against all parties interested under it, has attached the quality that it may be allowed to go out of repair during a tenancy for life. To insist that the tenant for life shall expend the money in repair is in this state of facts not to give effect to s. 53 of the Act of 1882 by preserving the rights of all parties interested in succession, but to create a right which the settlor negatived, namely, a right in the remaindermen to call upon the tenant for life to repair. For these reasons I am of opinion that the 881*l.* is payable to the tenant for life, and is in his hands not subject to any obligation to expend it in putting the premises in repair.

KENNEDY L.J. In this case Swinfen Eady J. has held that the sum apportioned in respect of dilapidations to buildings is payable to the trustees of the settlement and not to the tenant for life for his own benefit; in other words, that the money which represents the damages payable by the lessee for breach of the covenant to repair ought to be treated as capital money. That decision is based upon s. 53 of the Settled Land Act, 1882.

I am unable to concur in this view. It appears to me that the words "duties and liabilities of a trustee for those parties," in relation to the exercise of powers under the Act, must be read in connection with the terms of the particular settlement. Here the tenant for life was unimpeachable for waste. I agree with the Master of the Rolls that the tenant for life could not properly have obtained the consent of the trustees for a lease of twenty-one years which might outlive his own tenancy and might so affect the interests of the remainderman, without the insertion in the lease of the repairing covenant. But when, in fact, the lease has expired, I do not see how the section operates to deprive the legal life tenant without impeachment of waste of moneys which, being paid by the lessee in satisfaction of his legal duty under the covenant to prevent waste, do not, when they come into the hands of the tenant for life, represent, if I may be allowed the phrase, a corresponding liability on his part, because, by the express terms of the settlement, he has been relieved from any such liability.

C. A. 1911

LACON'S SETTLEMENT, *In re.* LACON *v.* LACON.

Kennedy L.J.

It appears to me that the existence of the freedom from impeachment of waste creates in itself a sufficient ground for my judgment. I do not think that the learned text-writers cited by Swinfen Eady J. in his judgment, in the passages referred to, have in view such circumstances as exist in the present case. I venture to doubt whether *Mitchell* v. *Armstrong* (1) was rightly decided, and the judgments in *Chandler* v. *Bradley* (2) and *In re Rodes* (3) do not appear to me really to conflict with the view which I prefer.

The case put by Swinfen Eady J. of the destruction of a house of which a lease has been granted is not, as it seems to me to be, a parallel case to the present. There is, I think, a real difference between the insurance money which represents the subject-matter of the lease and compensation for waste in respect of which the lessor is not answerable to any successor in interest.

I desire only to add that I concur in the fuller statement of reasons which is contained in the judgments which have been pronounced by the Master of the Rolls and Buckley L.J. allowing this appeal.

Solicitors: *Grover, Humphreys & Son; Wellington Taylor.*

(1) 17 Times L. R. 495. (2) [1897] 1 Ch. 315.
(3) [1909] 1 Ch. 815.

W. C. D.

JOYCE J.
1910
July 7, 16;
Dec. 9, 20.

In re NORTON.
NORTON *v.* NORTON.

[1910 N. 151.]

Will—Remoteness—Gift to Daughter of Testatrix for Life—Gift over after Death of Daughter and any Husband with whom she might intermarry—Power—Exercise—Validity.

The testatrix gave her residuary estate to trustees upon trust to pay one fifth of the income thereof to each of her two sons and three daughters for life, and after the death of each daughter leaving a husband to pay the income of her share to her husband during his life, and after the death of each of her sons and the survivor of each of her daughters and any husband with whom she might intermarry, leaving children or more remote issue living at the time of such death, in trust for the children or more remote issue of such son or daughter as he or she might appoint, and in default of appointment for the children then living and the issue of such as might be then dead, and in case of the death of any son or daughter without leaving issue, then, after the death and failure of issue of each son, and after the death of the survivor of each daughter so dying and whose issue should so fail and any husband with whom she might have intermarried, then the trustees were to stand possessed of the share to the income of which such son or daughter was entitled, to pay the income thereof equally amongst the survivors of the testatrix's sons and daughters during their lives. And on the death of the last survivor of the sons or daughters and the husbands of daughters there was an ultimate trust of the corpus for the children of sons and daughters who had died leaving children then living and the issue then living of children who should be then dead.

The testatrix died in 1881, leaving her two sons and three daughters her surviving. E., one of the daughters, who at the date of the will was married, died intestate in 1903 without having had any children, and leaving a husband, who died in 1909:—

Held, that the gift over of the income of her share to the survivors of the testatrix's sons and daughters was not void for remoteness, but that there was no valid gift over of the corpus of her share.

Another daughter, F., was also married at the date of the will. Her husband died in 1895, and she had not married again. She had nine children, all of whom were living and had attained twenty-one. By a deed poll in 1907 in exercise of her power she irrevocably appointed her share to her nine children in equal shares, subject to her life interest:—

Held, that the limitations, by the joint operation of the will and deed of appointment created, of the share to the income of which F. was entitled for her life were not such as must necessarily take effect, if at

JOYCE J.

1910

NORTON, *In re.* NORTON *v.* NORTON.

all, within the limits of the rule against perpetuities; and consequently that the power had not been validly exercised.

Semble, if F. had appointed merely life interests to her children or even remoter issue in existence at her death, or had appointed interests to her children or issue which by the very terms of their creation must vest and take effect if at all within the limits allowed by the rule against perpetuities, such appointments would have been a valid exercise of the power.

ADJOURNED SUMMONS.

The testatrix Betty Norton by her will, dated January 26, 1866, gave all her real and personal estate to trustees upon trust for sale, conversion, and investment and to stand possessed of the interest, dividends, and annual proceeds of the said trust money when so invested upon trust (clause 3) "to pay one fifth part thereof to my son George Norton one other fifth part thereof to my son Thomas Norton and one other fifth part thereof into the hands of each of my three daughters Elizabeth Norton, Fanny Carter and Mary Ann Illingworth during the respective lives of my said sons and daughters," and (clause 4) "from and after the death of each of my daughters leaving a husband her surviving in trust to pay half-yearly the part or share of the interest dividends and annual proceeds thereof to which under all or any of the provisions of this my will she may have been entitled at the time of her decease unto her husband during his life for his own absolute use and benefit," and (clause 5) "from and after the decease of each of my said sons and of the survivor of each of my said daughters and any husband with whom she has now or may hereafter have intermarried leaving any child or children or more remote issue of such son or daughter respectively who may be living at the time of such death I direct that my said trustees shall stand possessed of the part or share of the said trust money of which such son or daughter at the time of his or her death shall have been entitled to the annual income under this my will in trust for such one or more of his or her children or more remote issue" as he or she should by deed with or without power of revocation or by his or her will appoint, and (clause 6) in default of any such direction and appointment (clause 7) "in trust for his or her child or children then living and the issue then living of any child who may be

then dead leaving issue such issue if more than one taking in equal parts the part or share only to which his her or their parent or respective parents would have been entitled if living and to be interests immediately vested in such of them as have then attained the age of twenty-one years and to become vested in such of them as may then be under that age upon their attaining the said age And" (clause 8) "in case any of my said sons and daughters shall depart this life without leaving lawful issue or leaving such all of whom shall happen to die under the age of twenty-one years then I declare that from the death of each of my sons who shall so die or whose issue shall so fail or from the failure of his issue which shall last happen and from the death of the survivor of each of my daughters so dying or whose issue shall so fail and any husband with whom she has now or may hereafter have intermarried or from the failure of her issue after the death of such survivor then my said trustees shall stand possessed of the part or share of the said trust money to the interest and dividends whereof such son or daughter so dying or whose issue shall so fail was entitled at the time of his or her death or would have been entitled if living on the failure of his or her issue upon trust to pay the interest and dividends of such share of the said trust money unto and equally amongst the survivors of my said sons and daughters if more than one then living and if and when only one survivor then to pay the same wholly to such survivor during the lives and life of such survivors and survivor such interest and dividends to become due and to be paid half-yearly on the days and times and in like manner and subject to the same provisions and restrictions in all respects as their or his original shares or share of the said interest and dividends of the said trust money And" (clause 9) "I declare that on the death of the last survivor of my said sons or daughters and the husbands of my daughters the part or share of the said trust money of which he or she by reason of the failure of issue of any of my other children shall have had the interest and dividends for life as aforesaid shall go to and be divided amongst the children of my sons and daughters who have died leaving children then living and the issue then living of any such children who

JOYCE J. 1910 NORTON, *In re.* NORTON *v.* NORTON.

may be then dead leaving lawful issue such children or issue to take per stirpes and not per capita in equal parts the part or share only to which their parent or respective parents would have been entitled if living and become interests immediately vested in such of them as may then be twenty-one years of age and in those who are then under that age upon their attaining the said age."

The testatrix died in 1881, leaving her two sons and three daughters her surviving.

The eldest son, George Norton, was a bachelor. The second son, Thomas Norton, was married and had three children, all of whom were living and had attained twenty-one.

The eldest daughter, Elizabeth Norton, was at the date of the will and at the time of the death of the testatrix the wife of Walter Norton. She died in 1903 intestate and without having had a child. Her husband died in 1909.

The second daughter, Fanny Carter, was at the date of the will the wife of Thomas Carter. He died in 1895, and she had not married again. She had nine children, all of whom were living and had attained the age of twenty-one years.

The third daughter, Mary Ann Illingworth, was at the date of the will and at the time of the death of the testatrix the wife of the defendant William Illingworth. She died in 1891 intestate and without exercising the power of appointment vested in her by the will of the testatrix, and leaving her surviving her husband and four children, all of whom were living and had attained the age of twenty-one years.

By a deed poll dated January 11, 1907, Mrs. Carter, in exercise of the power vested in her by the will, irrevocably appointed that the share of the trust property of which she should at the time of her death have been entitled to the annual income should be vested in and belong to her nine children in equal shares, subject to her life interest.

This was an originating summons taken out by the trustees for the determination of the following questions, namely :—

1. Was the gift over of the income of the share to the income of which Elizabeth Norton was entitled for her life valid or void for remoteness ?

2. Was there any valid gift over of the corpus of the share to the income of which Elizabeth Norton was entitled for her life, and, if so, in favour of whom? If there was no valid gift over, to whom does such corpus pass?

3. Was the power given by the will to Fanny Carter to appoint the share to the income of which she was entitled for her life valid or void for remoteness?

4. If such power was invalid, to whom would the share to the income of which Fanny Carter was at present entitled for her life pass upon her death, leaving issue?

5. To whom would the corpus of the share to the income of which Mary Ann Illingworth was entitled for her life pass upon the death of her husband?

6. To whom would the income and corpus of the share to the income of which George Norton was entitled for his life pass upon his death without issue?

Percy Wheeler, for the trustees.

Galbraith, for Mrs. Carter and some of her children. The limitation in clause 8 in case of a daughter dying without issue from and after the death of the survivor of such daughter and any husband with whom she has now or may hereafter have intermarried may be split into two separate alternative limitations: *In re Davies and Kent's Contract* (1); *In re Bowles.* (2) The Court will strike out the alternative limitation which offends against the law of perpetuity: *Miles* v. *Harford.* (3) At any rate the gift in remainder to the surviving sons and daughters is to persons living at the testator's death, and the interposition of life interests to unborn persons does not invalidate it: *Evans* v. *Walker* (4); *In re Ashforth* (5); *Blight* v. *Hartnoll.* (6)

Hodge, for Mrs. Lake, one of the children of Mrs. Carter.

A. Adams, for the children of Mrs. Illingworth.

J. L. Whitaker, for one of the next of kin. The gift over both of the income and the corpus is bad for remoteness. I rely upon what was said by Farwell J. in *In re Bowles* (7), namely,

(1) [1910] 2 Ch. 35.
(2) [1905] 1 Ch. 371.
(3) (1879) 12 Ch. D. 691.
(4) (1876) 3 Ch. D. 211.
(5) [1905] 1 Ch. 535.
(6) (1881) 19 Ch. D. 294.
(7) [1905] 1 Ch. 376.

JOYCE J. 1910 NORTON, *In re.* NORTON *v.* NORTON.

that if in that case actual life interests had been given to the husbands instead of a power to appoint to them, the gift to the class of children would have been void for perpetuity, because the class would not necessarily have been ascertainable within a life or lives in being and twenty-one years afterwards: see also *In re Harvey.* (1) Although the class to take must necessarily be ascertained within the limit, still the selection is to take place at a point of time which is too remote: *Blight* v. *Hartnoll.* (2)

Owen Thompson (*C. D. Myles* with him), for George Norton, the heir-at-law and one of the next of kin of the testatrix. The testatrix has contemplated a single event which is not capable of being split into two alternatives. This is not an executory gift as in *Miles* v. *Harford.* (3)

Luxmoore, for the legal personal representative of Walter Norton.

Beebee, for William Illingworth.

[The question as to the validity of the power given to daughters to appoint their shares was reserved for further argument.]

Cur. adv. vult.

July 16. JOYCE J. This is a matter of considerable complication. Extraordinary pains have been taken by the draftsman in the preparation of the will in question, but difficulties arise caused by the fact that he appears not to have apprehended or realized that the death of any husband whom a daughter of the testatrix might marry would not necessarily occur within the period of a life in being at the time of the testatrix's death and twenty-one years afterwards.

The original will was not divided into paragraphs, but for convenience, in the argument before me, it was considered to be so divided. I will first make one or two observations upon the several clauses of the will. In clause 5, according to my reading, the expression "such death," in reference to the share of which the income is given to a son for life, is the death of the son; but as to any share of which the income is given to a daughter it is the death of the survivor of the daughter and any husband she

(1) (1888) 39 Ch. D. 289. (2) 19 Ch. D. 294, 300.
(3) 12 Ch. D. 691.

may marry, not the death of the daughter herself. The expression "such daughter" which occurs a little further on is not any or every daughter, but only a daughter who dies leaving children or more remote issue who are living at the death of the survivor of the daughter and her husband, that is any husband she may marry, such death, of course, not necessarily occurring within a life in being at the testatrix's death and twenty-one years afterwards. In clause 7 the limitation in default of appointment is to children then living and the issue then living of any children who may be dead. "Then living" is living at the death of the survivor of the daughter and any husband she may marry.

In clause 8 the limitation in case any daughter shall die without leaving issue is a separate, or may be taken as a separate, and substantive limitation which must take effect, if at all, within the life in being at the time of the testatrix's death, and so it is not void for remoteness. And such limitation, therefore, to any surviving husband is good although he was not born in the testatrix's lifetime. A limitation after a life interest to such husband is also perfectly good if it be to a person living at the testatrix's death or ascertained within the period allowed by the rule against remoteness. Consequently the limitation after the death of any daughter dying without issue, or after the death of the survivor of such daughter and her husband, whenever born, to the survivors of the testatrix's sons and daughters during their lives is unobjectionable, since they were all living at the death of the testatrix. In the same clause, the limitation in case of any daughter dying without issue from and after the death of the survivor of such daughter and any husband with whom she has now or may hereafter have intermarried cannot, in my opinion, be split into two separate alternative limitations, one limitation to take effect, in the case of a daughter dying without leaving issue, from and after the death of the survivor of such daughter and her then present husband (which means her husband at the date of the testatrix's death), and the other limitation to take effect, in case of the death of a daughter who dies without leaving issue, from and after the death of the survivor of such daughter and any husband she may marry. Upon consideration, however, I do not see what real difference it would make if such

JOYCE J. 1910 NORTON, *In re.* NORTON *v.* NORTON.

splitting up were allowed, because the limitation after the death of the survivor of the daughter who dies without issue and any husband of hers to the surviving sons and daughters for life is good. I now come to the specific questions.

First: "Is the gift over of the income of the share to the income of which Elizabeth Norton was entitled for her life valid or void for remoteness?"

Elizabeth Norton, as I understand it, died in 1903 without issue; her husband died in 1909. Upon his death the income of the share to the income of which she was entitled, in my opinion, went to the survivors or survivor of the sons and daughters, not including Mr. Illingworth, whose wife had died previously in 1891. He was not a surviving son, and clause 4, if it had any operation with reference to this, gives him (Mr. Illingworth) no more than the income to which his wife was entitled at the time of her death. She was the first of the children to die and so never was a survivor. That answers also the question whether, if it is valid, William Illingworth, or any future husband of Fanny Carter, is entitled to participate.

Now I come to question 2: "Is there any valid gift over of the corpus of the share to the income of which Elizabeth Norton was entitled for her life, and, if so, in favour of whom?" As I have said, she died in 1903, without issue. There is no valid gift over of the corpus of the share to the income of which she was entitled for life, because clause 9, which otherwise might have applied, does not take effect and does not purport to take effect until the death of the last survivor of the sons and daughters and the husbands of daughters, an event which will not necessarily happen within a life in being at the testatrix's death and twenty-one years afterwards. And, further, it is to a class of persons, the children and remoter issue then living and not previously ascertainable. Consequently there is no valid gift over of the corpus of that share.

Then the question goes on: "If there is no valid gift over, to whom does such corpus pass?" For the moment I will pass over questions 3 and 4.

Question 5 is: "To whom does the corpus of the share to the income of which Mary Ann Illingworth was entitled for

her life pass upon the death of her husband?" She died leaving children who have attained twenty-one years of age. I am unable to find any valid disposition after Mr. Illingworth's death of the corpus, or, I think, of the income of the share to the income of which Mrs. Illingworth was entitled for her life.

Now question 6: "To whom will the income and corpus of the share to the income of which George Norton is entitled for his life pass upon his death without issue?" Upon the death of George Norton without issue, the income of the share to which he is entitled for life would, in my opinion, go to the survivors or survivor for the time being of the sons and daughters under clause 8, and I see no valid disposition of the corpus of this share any more than of that of Elizabeth Norton.

I now return to questions 3 and 4. Question 4 is: "If such power was invalid, to whom will the share to the income of which Mrs. Fanny Carter is at present entitled for her life pass upon her death, leaving issue?" She is a widow. The gift in default of appointment appears to me to be bad, because it is to a class not necessarily ascertainable within the limits of the rule.

Now with reference to question 3: "Was the power given by the will to Fanny Carter to appoint the share to the income of which she is entitled for her life valid or void for remoteness?" Upon this I have not heard much argument, but it is obviously a question of great importance to the parties whether, if Mrs. Carter does not marry again and dies leaving issue, the appointment she has made is valid or not. I doubt whether I ought to decide this question without further argument. I have considered it a good deal, but if any of the parties desire to argue it further, I will hear them. They shall be heard further at a time to be appointed.

Dec. 9. *Percy Wheeler*, for the trustees.

Owen Thompson (*C. D. Myles* with him), for the defendant George Norton, the heir-at-law and one of the next of kin of the testatrix. This power is bad; its operation is conditioned on a contingency which may be too remote. The actual person to take must be ascertained within the prescribed limits of the

JOYCE J. 1910 NORTON, *In re.* NORTON *v.* NORTON.

rule against perpetuities: *Bristow* v. *Boothby* (1); *Blight* v. *Hartnoll* (2); Gray on Perpetuities, 2nd ed. p. 377, ss. 476 and 476a. If a limitation on a certain contingency would be too remote, a power whose operation is conditioned on that contingency is void, although an appointment might be made under it which must certainly take effect within the limits of the rule against perpetuities. Generally in such a case the intention is clear that the power is only to be exercised after the contingency has occurred. There is no such intention manifest here. If the husband survives the daughter the power cannot be exercised after the contingency has happened. See also Marsden on Perpetuities, pp. 237, 238, 239. If this power be held valid it will be necessary to overrule *Bristow* v. *Boothby*. (1)

Galbraith, for Mrs. Carter and her children. This power is exercisable by Mrs. Carter only if the event happens in her lifetime, i.e., if she survives her husband and leaves issue: Marsden on Perpetuities, p. 238. The case is analogous to those where there is a power of appointment by will amongst children or issue, and an appointment is made to children at twenty-five which is prima facie outside the limit of perpetuity. In such a case it is permissible to wait until the death of the appointor to see whether the appointees are then four years old; if they are the appointment is good; if not it is bad.

Assuming that the power goes beyond the limits, then the condition may be rejected. This case is not within *Bristow* v. *Boothby*. (1) Here the power is presently exercisable but takes effect upon a future event. It is a power of selection. If the selection is of proper persons the power is valid. It depends upon how it is exercised: Gray on Perpetuities, 2nd ed. pp. 377, n. (2), 378, n. (1); Jarman on Wills, 6th ed. vol. i. pp. 310, 311. The true view is that this power must be exercised, if at all, by Mrs. Carter in her lifetime. The power cannot have any effect unless the event happens not later than her death. Any other construction renders the whole disposition void: *Earle* v. *Barker*. (3)

A particular power may embrace objects of any degree of

(1) (1826) 2 S. & S. 465. (2) 19 Ch. D. 294.
(3) (1865) 11 H. L. C. 280.

remoteness. Such a power will not be void because it attempts to authorize an appointment to persons not necessarily born or the creation of interests not necessarily vested within the limits of perpetuity: Lewis on Perpetuities, p. 487, ch. 20, s. 2.

It is necessary to wait until the power is exercised before it can be said whether the appointment is valid or not. One of the tests is to read the appointment into the original will. If Mrs. Carter appoints to her children at twenty-one the condition will be satisfied. At her death the property will have been given to persons who come within the limits of perpetuity: *In re Thompson* (1); *In re Coulman.* (2)

Hodge, for Mrs. Lake.

Owen Thompson in reply. The cases cited do not apply when the power itself is bad, i.e., when the operation of the power cannot arise until after the limit, or when the operation may be postponed until a period which is beyond the limit: *Bristow* v. *Boothby* (3), where the power was held bad notwithstanding that the appointment under it was actually within the limit.

Cur. adv. vult.

Dec. 20. JOYCE J. The question which, as I understand it, the plaintiffs are asking by the summons is whether the power given by the testatrix to any daughter to appoint the share held upon trust for such daughter is capable of being validly exercised.

A bequest or devise is void for remoteness unless it must of necessity take effect, if at all, within a life or lives in being at the testator's death and twenty-one years after; and this is so none the less, although the legatee or devisee be an ascertained person living at the testator's death, if what is given to him be an absolute transmissible interest. If, however, what is given were, for example, only a life interest, the bequest or devise would obviously take effect, if at all, within a life in being at the testator's death: see Gray on Perpetuities, 2nd ed. p. 252, and Jarman on Wills, 6th ed. vol. i. p. 352.

A bequest to an unborn person for life, for instance any

(1) [1906] 2 Ch. 199. (2) (1885) 30 Ch. D. 186.
(3) 2 S. & S. 465.

JOYCE J. 1910 NORTON, *In re.* NORTON *v.* NORTON.

husband a daughter may marry, though born after the testator's death, is not necessarily void for remoteness. After the life interest to such unborn person, the absolute interest may be given to a person or persons living at the testator's death, or ascertained within the period allowed by the rule.

In the present case the testatrix, Betty Norton, directed her trustees to stand possessed of her residuary estate upon trust, to pay one fifth of the annual income to each of her three daughters during her life, and after the death of each daughter, leaving a husband her surviving, in trust to pay the share of the annual income to which under any of the provisions of the will she, that is the daughter, might have been entitled at her decease unto her husband during his life, and after the decease of the survivor of each of the testatrix's daughters, and any husband with whom she might intermarry (this includes and would apply to the event of the daughter herself being the survivor), leaving any child or children or more remote issue of such daughter who might be living at the time of such death (by which I understand the decease of the survivor of the daughter and her husband), the trustees were to stand possessed of the part or share of the trust money of which such daughter at the time of her death should have been entitled to the annual income, in trust for such one or more of her children or more remote issue as she should, by deed with or without power of revocation or by will, appoint, and in default of appointment in trust for her children then living, and the issue then living of any child who might be then dead, leaving issue, such issue, if more than one, taking, as I may express it briefly, per stirpes, their interests to be vested at twenty-one years of age. Afterwards provision is expressly made for the case of a daughter dying without leaving issue, or leaving issue who all die under twenty-one.

Now it is obvious that any daughter might take a husband who was not born in the lifetime of the testatrix, Betty Norton, and what is given to him would or might be a bequest to an unborn person for life, and his death, or the death of the survivor of the daughter and her husband, need not necessarily occur within the period allowed by the rule.

It is unfortunate that after the words "the decease of the

survivor of each of the testatrix's daughters and any husband with whom she might intermarry" the draftsman did not add "or of the daughter herself in the event of her leaving no husband her surviving" or words to that effect, thus making an express disposition in the possible event of there being no surviving husband. If this had been done, and the event last mentioned had been the one that happened, the succeeding limitations would have been unobjectionable: see *Monypenny* v. *Dering*. (1) No express disposition, however, is made of the corpus of the share to the income of which a daughter is entitled for her life, in the event of her leaving issue but no husband her surviving, except in the clause which provides for what is to be done upon the death of the survivor of a daughter who marries, and any husband with whom she might intermarry.

According to the authorities it is settled that in construing the will the Court may not, in order to escape from the consequence of this rule against remoteness, sever or split up the compound event, the death of the survivor of the daughter and her husband, so as to make a separate and express disposition after the death of the daughter leaving no surviving husband. We must take the disposition after the death of the survivor of the daughter and her husband exactly as we find it in the will: see *Miles* v. *Harford* (2) and *Hancock* v. *Watson* (3); and a limitation is void if expressed to take effect upon a compound event that includes two or more events, of which one may be too remote, although the other, and the one that actually happens, be not too remote.

The disposition made by this will after the death of the survivor of a daughter and any husband is contingent and conditional upon there being issue, children or more remote, of the daughter living at the death of the survivor of the daughter and her husband, so that it would not necessarily be determined until this event (that is, the death of the survivor) whether the subsequent limitation of the will can take effect or not. Further, the limitation in default of appointment for another reason also appears to me to be hopelessly bad, for it is to a class not

(1) (1852) 2 D. M. & G. 145. (2) 12 Ch. D. 691.
(3) [1902] A. C. 14.

JOYCE J. 1910 — NORTON, *In re.* NORTON *v.* NORTON.

ascertainable until the death of the survivor of the daughter and her husband, a person possibly not born in the lifetime of the testatrix: see Marsden on Perpetuities, p. 175.

Mrs. Carter was one of three daughters. She is now a widow and of an advanced age, seventy-nine years. She has appointed by deed absolute transmissible interests to her children. If we read this appointment into the original will of Betty Norton, we then have a limitation from and after the death of the survivor of Mrs. Carter and any husband she may have, leaving issue, children or more remote, of Mrs. Carter then living, to certain named persons. But a bequest of an absolute and transmissible interest upon a contingency which may possibly not happen within the period allowed by the rule, though to named persons, who were in existence at the death of the testator or testatrix, is void for remoteness: see Jarman on Wills, 6th ed. vol. i. p. 305. The result therefore appears to be that the limitations by the joint operation of this will and deed of appointment declared or created of the share of income to which Mrs. Carter is entitled for her life, after the death of the survivor of Mrs. Carter and any husband she may have, cannot be supported. They are not limitations which must of necessity take effect, if at all, within a life or lives in being at the death of the testatrix, Betty Norton, and twenty-one years afterwards.

Now although, as at present advised, I think that the absolute transmissible interests appointed by Mrs. Carter to her children are not validly created, inasmuch as they may not vest or take effect within a life or lives in being at the death of the testatrix, Betty Norton, and twenty-one years afterwards, I hesitate to decide this during Mrs. Carter's life; and most certainly I am not going to say that Mrs. Carter may not, by will or possibly even now by deed, make an appointment that may be perfectly good. For instance, suppose she were to appoint to children (or even remoter issue in existence at her death), limiting to them not absolute but only life interests in what I may call her share, those life interests would of necessity vest, if at all, within the limit of the period allowed by the rule. What the effect would be of her appointing interests to her children which, by the very terms of their creation, must vest and take effect, if at all, within

the limit allowed by the rule I am not prepared to say, but apparently it would be well arguable that the interests created by such an appointment would be good. Possibly the same might be said of an appointment expressed to be contingent upon Mrs. Carter dying without marrying again. It would therefore, I think, be wrong for me to decide anything that might prejudice the question of the validity of any further appointment that Mrs. Carter may make, either by deed or will. When Mrs. Carter dies the questions arising upon the effect or validity of any or all of the appointments she may have made can be decided between the parties then claiming to be interested—I mean the appointees and the persons, if any, then claiming the trust funds as undisposed of. At present, in my opinion, it is premature to decide the question.

Solicitors: *Jaques & Co., for Hall, Walker & Norton, Huddersfield; H. S. Holt, for Norton Carter & Wade, Leeds; Rollit & Sons, for A. R. Lake, Wakefield.*

G. A. S.

In re ORLEANS MOTOR COMPANY, LIMITED.

[1910 O. 415.]

Company — Winding-up — Floating Charge within Three Months of Winding-up—Meaning of "Cash"—Agreement for Floating Charge—Registration — Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 93, 212.

The object of s. 212 of the Companies (Consolidation) Act, 1908, was to prevent insolvent companies from creating floating charges to secure past debts or for moneys which do not go to swell their assets and become available for creditors.

The term "cash" in s. 212 is not to be interpreted by the light of the decisions as to the meaning of that term in s. 25 of the Companies Act, 1867.

Where moneys are advanced to secure the liability of a company under an antecedent independent guarantee, debentures giving a floating charge created by the company in favour of the guarantors, who find money to pay off the debt owing by the company and guaranteed by them, are, if the company goes into winding-up within three calendar months after the issue of the debentures, invalid unless it is

PARKER J.

1911

ORLEANS MOTOR COMPANY, LIMITED, *In re.*

proved that the company was solvent immediately after the creation of the charge.

Quære whether it is necessary to register under s. 93 of the Act an agreement by a company to give a debenture containing a floating charge on its assets, where no debenture has actually been issued.

THE Orleans Motor Company, Limited, had an overdraft at its bankers, and on October 13, 1904, five of the directors of the company gave to the bankers a joint and several guarantee of the overdraft to the extent of 2000*l.*

At the beginning of February, 1910, the overdraft amounted to a large sum, and the bankers were pressing the company to pay the overdraft and also the five directors in respect of the guarantee.

A meeting of directors of the company was held on February 8, 1910, at which four of the guaranteeing directors were present, and a resolution was then passed that the company should pay 1500*l.* to the bank in respect of the overdraft. At the same time it was agreed (although the agreement was not entered in the minutes of the meeting) that in consideration of the guaranteeing directors finding the 1500*l.* they should receive debentures to cover them in addition to debentures of the company which they already held.

Three of the guaranteeing directors within a few days after the meeting sent to the company three cheques for 500*l.* each, and on February 22, 1910, the company sent its cheque to the bank for 1500*l.*

At another meeting of the directors of the company, held on March 8, 1910, the three directors who had paid the 1500*l.* were present, and a resolution was passed for the issue of debentures of the company for 500*l.* to each of them. These debentures were never issued, and there was no entry in respect of them in the register kept under s. 93 of the Companies (Consolidation) Act, 1908.

Shortly afterwards the present action was brought to realize the debentures of the company, and on April 23, 1910, a resolution for the voluntary winding-up of the company was passed.

The same three directors afterwards sued one of their

co-sureties in the King's Bench Division to recover his share of the 1500*l.* paid by them and recovered judgment against him.

On February 1, 1911, the Master made his certificate in the debenture action, in which he found that under the circumstances the three directors were entitled, in addition to the debentures registered in their names, to stand in the same position as if debentures for the 1500*l.* had been issued to them in accordance with the resolution of March 8, 1910.

A summons was taken out by the person having the conduct of the proceedings in the debenture action to vary the certificate by striking out this finding.

Austen-Cartmell, for the applicant. By s. 212 of the Companies (Consolidation) Act, 1908, where a company is being wound up a floating charge created within three months of the commencement of the winding-up is, unless it is proved that the company immediately after the creation of the charge was solvent, to "be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest" at 5 per cent. The Master apparently relied on *In re Columbian Fireproofing Co.* (1), but that case is distinguishable, as in the present case the only payment was to discharge the guarantee in which the directors making the payment had previously joined. This was not a payment of cash to the company, for the only concern of the company in the matter was that the directors had a claim over against the company.

Another objection is that the equitable charge, if there was one, was invalid for want of registration under s. 93 of the Act of 1908. The object of legislation requiring registration "is that those who are minded to deal with limited companies shall be able, by searching a certain register, to find whether the company has incumbered its property or not. An agreement to give security may be either one of two things. It may be so expressed as to create a present equitable right to a security. If it does that, then it would seem to me that it must be registered, ... otherwise it is void as against the liquidator and

(1) [1910] 2 Ch. 120.

PARKER J. 1911 ORLEANS MOTOR COMPANY, LIMITED, *In re.*

any creditor of the company. Or it may be so expressed as to be merely an agreement that in some future circumstances a security shall in the future be created. In that latter case, the agreement not creating a present security will not require registration": per Buckley J. in *In re Jackson & Bassford, Ld.* (1)

Romer, K.C., and *Mulligan*, for the three directors. Where there is a series of debentures containing a charge it is sufficient if certain particulars are registered together with one of the debentures; and it is unnecessary to register each debenture: Companies (Consolidation) Act, 1908, s. 93, sub-s. 3; *In re Harrogate Estates, Ld.* (2) The same law applies where an equitable right to the issue of a debenture of a series is given. What was done was a payment of "cash" "in consideration for the charge" within the meaning of s. 212 of the Act. It is immaterial whether the payment was made under the guarantee already given. It is not denied that the company owed the bankers money, and it is enough to shew that that money was paid to the bankers at the company's request. The request will be inferred from the fact that the bankers were pressing the company for payment. Crediting with payment of money was held to be payment in "cash" for shares within the meaning of s. 25 of the Companies Act, 1867: *Ferrao's Case.* (3) Although s. 25 of the Act of 1867 has been repealed and many of the decisions on it have become obsolete, many of them, as to payment in cash, are still valuable: Buckley on Companies, 9th ed. p. 200. In *In re Columbian Fireproofing Co.* (4) part of the money was paid about ten days before the debenture was given. [They also referred to *Ex parte Fisher.* (5)]

Austen-Cartmell in reply. In *In re Columbian Fireproofing Co.* (4) there was no antecedent debt, but the debenture was part of one transaction by which it was given in consideration of a cash payment. *Ferrao's Case* (3), *Spargo's Case* (6), and *Larocque* v. *Beauchemin* (7) shew that under s. 25 of the Act of 1867 or similar legislation sums credited in respect of shares might in

(1) [1906] 2 Ch. 467, 476.
(2) [1903] 1 Ch. 498.
(3) (1874) L. R. 9 Ch. 355.
(4) [1910] 2 Ch. 120.
(5) (1872) L. R. 7 Ch. 636.
(6) (1873) L. R. 8 Ch. 407.
(7) [1897] A. C. 358.

certain cases be taken as "cash," but they do not throw light on the meaning of that word in s. 212 of the Act of 1908.

PARKER J. I think that I am almost bound to hold upon the evidence before me that the three directors concerned each paid the sum of 500*l.* to the bank under and in consequence of the guarantee which they had given for the company's overdraft. If I held anything else I should be holding that they wrongly obtained against their co-surety the judgment in the action in the King's Bench Division. It appears that at the time of the transaction the company, through its directors, agreed to give to each of these three gentlemen, by way of security for the sums paid by them under the guarantee, debentures of the company. The debentures were never actually issued; but the evidence points to this agreement having been made. The agreement, if it created a charge at all, created it within three months of the resolution for the winding-up of the company; and the only question, therefore, is whether s. 212 of the Companies (Consolidation) Act, 1908, applies to the case. [His Lordship read the section, and continued.] It is impossible to hold that any money was actually paid to the company at all. Three cheques passed through its hands, but they were never part of the company's assets to do what it liked with, since the company was under an obligation to hand them over to the bank in discharge of the overdraft. The debentures, therefore, were to be issued to secure an antecedent independent transaction; they were to be issued on account of the guarantee. It is said that I may treat the money as having actually passed on the doctrine of the cases on the question whether shares in a company, prima facie issued for payment in cash, have actually been paid for in cash; that I can treat the liability under the debentures as set-off against the liability of the company to pay what had been paid under the guarantee. In my opinion that would be a wrong view to take, on the true construction of the section. The section was designed apparently to prevent companies on their last legs from creating floating charges to secure past debts or for moneys which do not go to swell their assets and become available for creditors. I hold that such charge, if any, as is created by the agreement

PARKER J. 1911 ORLEANS MOTOR COMPANY, LIMITED, *In re.*

is invalid under s. 212; and it is therefore unnecessary for me to go into the question whether the charge, if any, was one which required registration. The certificate must be varied accordingly.

Solicitors for applicant: *Hicks, Arnold & Mozley.*
Solicitors for the three directors: *Castle & Co.*

F. E.

PARKER J. 1911 *April* 4, 5, 28.

In re LODGE'S PATENT.

[1910 L. 0129.]

Patent—Extension of Term as to some only of Claims—Condition as to granting Compulsory Licences—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 18.

Letters patent were granted for an invention as to wireless telegraphy of great merit, in respect of which the inventor had been inadequately remunerated, and the commercial development of which had been impeded by various causes. An application for an extension of the term of the patent was opposed by the Crown mainly on the ground that all systems of wireless telegraphy involved the use of means shewn in the patent, and that the patentee had never taken steps to prevent the use of such means by others:—

Held, that the Court had power to extend the patent as to one or more of its claiming clauses without extending it as to all of them, and that the patent must be extended as to some only of the claiming clauses for seven years from the expiration of the existing patent, subject to a condition making it incumbent on the patentee to grant licences to all who desired to make use of the protected invention on such terms as an arbitrator appointed by the Board of Trade should think fit and reasonable.

Mr. (afterwards Sir) Oliver Lodge, F.R.S., on May 10, 1897, obtained a grant of letters patent (11,575 of 1897) for "Improvements in Syntonised Telegraphy with Line Wires." In his complete specification he stated that the object of his invention was "to enable an operator, by means of what is known as Hertzian wave telegraphy, to transmit messages across space to any selected one or more of a number of different individuals in various localities each of whom is provided with a suitably arranged receiver, and to effect the ancillary improvements the

nature of which are indicated in my provisional specification and are hereafter more particularly described." After describing, with the aid of figures, the method of intercommunication which was the subject of the letters patent, the inventor made the following claims:—

"1. In a system of Hertzian wave telegraphy, the combination with a pair of capacity areas (of which one may be the earth) of a self-inductance coil inserted between them electrically, for the purpose of prolonging any electrical oscillations excited in the system and constituting such a system a radiator of definite frequency or pitch."

"2. In a system of Hertzian wave telegraphy, the combination with a pair of capacity areas (of which one may be the earth) of a self-inductance coil inserted between them electrically, for the purpose of prolonging any electrical oscillations excited in the system, and thereby enabling a distant radiator to act cumulatively if of corresponding period; thus constituting the system a resonator or absorber of definite frequency or pitch."

"3. In a system of Hertzian wave telegraphy, the combination with a pair of capacity areas (one of which may be the earth) of means inserted between them electrically serving to syntonise them and to render them adaptable for use at will either as a radiator or resonator."

"4. In a system of Hertzian wave telegraphy, the combination with a pair of capacity areas (one of which may be the earth) of a number of self-inductance coils, each of which is capable of being switched in or out of circuit so as to furnish different amounts of self-induction, thus serving to syntonise each radiator to a corresponding resonator or vice versa, whereby signalling may be effected between any two or more correspondingly attuned stations without disturbing other differently attuned stations."

"5. In a system of Hertzian wave telegraphy, the combination with a pair of capacity areas (one of which may be the earth) of an adjustable self-inductance coil adjustable either by definite steps or by continuance motion of its part serving to syntonise such radiator and resonator to each other whereby signalling may be effected between any two or more correspondingly

PARKER J. 1911 LODGE'S PATENT, *In re.*

attuned stations without disturbing other differently attuned stations."

"6. In combination, a pair of capacity areas connected by a coil of wire serving as a radiator in a system of Hertzian wave telegraphy, means for syntonising such radiator and means for charging it by aerial disruption or impulsive rush."

"7. In a system of Hertzian wave telegraphy, the combination of a pair of capacity areas such as hh_1, means for syntonising such capacity areas, a receiving circuit completed through one or both of such capacity areas or their adjuncts, and means for bridging over the discharge gap between such capacity areas when they are to be used as a receiver whereby such capacity areas are rendered adaptable for use at will either as a radiator or resonator."

"8. A coherer comprising a needle point resting upon a flat metallic surface, means for regulating the pressure of the one upon the other, and means for producing a mechanical impulse or tremor therein after it has received an electric impulse substantially as and for the purpose set forth and as illustrated in the accompanying drawing."

"9. In a system of Hertzian wave telegraphy the combination with the self-inductance coil of the receiver of a secondary coil surrounding the same, which secondary coil forms part of the coherer circuit substantially as and for the purpose set forth."

"10. The combination, in the receiving circuit of a system of Hertzian wave telegraphy, of an adjustable or replaceable self-inductance coil, connecting with the capacity areas, a coherer, a battery, a telegraphic receiving instrument or a telephone with or without a shunt across the coils thereof substantially as and for the purpose set forth."

"11. The construction arrangement and combination of parts constituting my improved system of syntonic Hertzian wave telegraphy substantially as set forth and as illustrated in the accompanying drawings."

The nature of the invention is more particularly described in the judgment of Parker J., infra.

The only foreign patents which Sir Oliver Lodge obtained were two in the United States of America, which he obtained in

August, 1898, and May, 1901. He applied for a patent in Germany, but was refused owing to the previous inadvertent publication of the invention.

On June 29, 1901, Sir Oliver Lodge and A. Muirhead, H. J. Muirhead, and F. L. Muirhead formed a company under the Companies Acts, 1862 to 1900, called the Lodge-Muirhead Wireless and General Telegraphy Syndicate, Limited, and in July, 1901, the above-mentioned English letters patent and other letters patent were assigned to the company.

As part of the consideration for the assignment the company allotted to Sir Oliver Lodge a number of its ordinary and existing preference shares.

In November, 1910, the company presented a petition to the High Court of Justice under s. 18 of the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), asking for a prolongation of the term of sole using and vending the invention for the further and additional term of fourteen years, or for such other term as to the Court should seem fit, and for the grant of new letters patent to the petitioners for such term as to the Court should seem fit after the expiration of the first term originally granted by the existing letters patent.

The petition stated that Lodge had expended very much time and labour in research upon the production of electric waves; that his invention constituted a great advance on the knowledge available at the date of his patent and had been of fundamental importance in the development of the art of radio-telegraphy; that at the time of obtaining his patent he had not been able to expend large sums in the commercial development of his invention, but had nevertheless made continued endeavours from the date of the patent to secure the commercial exploitation of his invention; that large scale experiments had been made by him and the Muirheads; that Lodge had not received any consideration or remuneration in cash for his patent or invention, or in fact any consideration except the shares above mentioned; that before the incorporation of the company, Lodge and one of the Muirheads, and subsequently the company, had expended large sums in experiments, trials, and demonstrations, at first without any return whatever; that the Postmaster-General had refused the petitioners a licence

BIBL. LONDIN UNIV.

PARKER J. 1911 LODGE'S PATENT, *In re.*

to erect wireless stations on the south coast, and that the petitioners were therefore unable to develop commercially a system of telegraphic communication in the United Kingdom and were restricted to the manufacture and sale of apparatus. The petition also stated that their apparatus had been employed by the War Office in certain manœuvres and at Aldershot and elsewhere, and had been supplied to H.M.S. *Vernon* for trial under service conditions, and alleged that the petitioners had had certain troubles with the Admiralty, and had supplied apparatus, which had been set up and successfully used, to the Government of India and other British and foreign departments and Governments and certain railway and other companies, but that, in spite of these matters and the fact that the business of the petitioners had increased, and that they had used every endeavour continuously since the date of the patent to exploit the invention, the petitioners had so far, as would appear from the accounts, sustained very considerable loss in the exploitation of the invention, and only now had expectation of remuneration.

The petition and the evidence in support of it were heard by Parker J. on April 4 and 5, 1911. The petition was opposed by the Crown only.

A. J. Walter, K.C., and *J. Hunter Gray*, for the petitioners. Lodge's complete specification, when read with the knowledge we now have, which has been gained in recent times, is a marvellous historic document in its prescience of wireless telegraphy. He has shewn what could never be found out by working simply on what was found out by Hertz or Marconi. We have merely to shew the Court what is the nature of the invention.

[PARKER J. I have more to do than to understand that. I have to consider the effect upon the public of prolonging the patent as well as the interest of the patentee; whether the prolongation will pull up the industrial undertakings which are now going on; and whether conditions should not be imposed, e.g., that free licences should be given to persons now using wireless systems.]

The Court might impose conditions, for instance that licences should be granted on reasonable terms.

[PARKER J. The primary object of prolongation seems to be to give a proper reward for a meritorious invention; but the secondary object is to protect the public.]

Prolongation is only granted for wide-reaching inventions which are of exceptional merit. The granting of licences is already provided for by s. 24 of the Act. The basis of prolongation is to enable a patentee—who, by stress of circumstances, which the Court thinks sufficient, has been prevented from getting a sufficient reward—to be sufficiently rewarded.

It may be sufficient to prolong the term in respect of some only of the claims, say claims 1 to 6 and 9.

It is significant that no member of the public is opposing the application. The Crown have given particulars of the nature of the objections raised to prolongation. So far as material they are as follows: "(1.) Having regard to the state of knowledge at the time, there was an insufficiency of novelty, invention, and general merit." That is not borne out by the history of wireless telegraphy. "(2.) Though the patented invention is claimed as a master patent for 'tuning,' by the insertion of a self-inductance coil, there has been no attempt to protect the patent rights claimed or to restrain the use of this method of tuning by private competitors."

[*Sargant*, for the Crown. That must be taken as meaning that, in consequence of there being no attempt to protect the patent rights during the fourteen years, systems have sprung up which might, if this patent is prolonged, be the subject of proceedings, by which a toll might be levied.]

That will have to be considered by the Court. "(3.) The invention is not protected by patents in any other country except the United States of America." An application to get a German patent failed because there had been previous publication. "(4.) The system of wireless telegraphy actually in use by the petitioners is sufficiently protected by the other patents belonging to the petitioners."

[*Sargant.* That will not be relied on.]

"(5.) Further, as regards the subsidiary claims made by the letters patent in question, namely, those subsequent to claim 4, there is not sufficient utility, nor does working take place in

PARKER J. 1911 LODGE'S PATENT, *In re.*

practice in accordance therewith." Probably that will not be relied on. The Court will recognize the merit which has been recognized by the War Office and other departments and by the Indian and foreign Governments. It will also bear in mind the difficulties caused by the Admiralty and the Post Office, and the great expense which has been incurred in experimenting and trying to make the invention a commercial success with the net pecuniary result of loss and not profit.

If prolongation will not put the petitioners in a better position so far as sending messages in or from this country is concerned, considerable receipts can be obtained from other countries, and in this country large orders for apparatus can be obtained; and an opportunity will be given to the petitioners to reimburse themselves the expenses to which they have been put. As to not fighting actions, we tried without success to make the Admiralty fight, and as regards other litigation, you cannot fight without funds—at any rate in patent actions. Notwithstanding their efforts to push the invention, the petitioners have been balked from the first. The applicants will, of course, submit to any conditions imposed by the Court. [They referred to *Foarde's Patent.* (1)]

Sir John Simon, S.-G., and *Sargant*, for the Crown. The opposition to the application is not that of an opponent at all costs, but merely that of the representative for this purpose of the Crown in order that the Court may have before it the considerations which should be raised before this very unusual indulgence is given to the applicants. Only four patents out of something like 80,000 in force have been prolonged. The foremost claim in Lodge's patent is one which is designed to protect the introduction of an inductance coil between two capacity areas for the purpose of wireless telegraphy, and, admittedly, that introduction is the common practice in wireless telegraphy and has been known to be such at any rate since the year 1900, and the practice has been followed by others since that year without any effective protest from the applicants. The extension of this patent may have the effect of gravely impeding and interfering with enterprises which have been

(1) (1855) 9 Moo. P. C. 376.

entered on and continued under the belief that any danger of a charge of infringement was past. Want of money is not a good answer to this objection.

Then, judging from the evidence that no profit has been made, it is difficult to see how the applicants can be better off in the future than they have been in the past. Even if an extension were granted on condition that compulsory licences are to be granted on terms fixed by an arbitrator, there would be difficulties, for he would have to proceed on the basis that the patent was a good one. The fact that a patentee has slumbered on his rights is a good ground for refusing to extend his patent: *In re Simister's Patent* (1); *In re Pinkus' Patent.* (2) The Court may make an extension in respect of some of several claims: *In re Church's Patents.* (3)

Cur. adv. vult.

April 28. PARKER J. In the system of wireless telegraphy protected by the letters patent the subject of this petition full use was made for the first time of the principle of resonance or syntony. The difficulty of utilizing this principle had been fully explained by the patentee himself, in 1894, in his well-known lecture before the Royal Institution. Electric oscillations in a good radiator are rapidly damped, and do not, therefore, give rise to such a long series of waves as is required for the purpose; and, on the other hand, a receiver which is a good absorber of wave energy is for that very reason unable to accumulate the effect of a series of waves. The patentee solves the problem by a compromise between the radiatory and oscillatory qualities of his transmitter on the one hand, and between the absorbing and accumulating qualities of his receiver on the other hand.

He was the first to realize what is now beyond dispute, that a certain diminution in the radiatory qualities of the transmitter or the absorbing qualities of the receiver will, so far as efficiency is concerned, be more than compensated by the cumulative action of a series of ether waves, and, further, that, by rendering his receiver responsive only to a train of waves, he can tune out all

(1) (1842) 1 Web. P. C. 721. (2) (1848) 12 Jur. 233.
(3) (1886) 3 Rep. Pat. Cas. 95.

PARKER J. 1911 LODGE'S PATENT, *In re.*

sending stations which are not working with the same wave length and so secure selectivity. The patentee effects his compromise by the introduction of an induction coil between the two capacity areas of his transmitter and receiver respectively, thus not only diminishing the natural frequency of his circuits, but also increasing what has been referred to as their "electric inertia," and in this way enabling the transmitting circuit to create, and the receiving circuit to accumulate, the effect of a series of waves as opposed to one or two waves of great amplitude.

In the practical working of this system the following points require notice. First, the coherer is removed from the path of the receiving circuit, in which it would hinder the accumulation of wave energy. The patentee places it in a derivative circuit, into which there can be an overflow of the energy accumulated in the receiving circuit. Secondly, great precision of tuning being required, the patentee provides an adjustable induction coil or two or more induction coils, which can be switched in or out of circuit as desired, the object being not only to secure precision of tuning between the transmitter and a single receiver, but to enable the operator to adjust the transmitter to various receivers at different receiving stations, thus securing the selectivity he desires. Thirdly, the patentee discloses means of bridging the spark gap of the transmitter so as to enable it, when disconnected with the charging circuit of the Ruhmkorff coil or other instrument employed, and when connected up to the coherer circuit, to be used as a receiver. Fourthly, the patentee conceives that the oscillations in the transmitter can be adversely affected by its metallic connection with the source of supply. He therefore provides means of charging the transmitter by impulsive rush without any such metallic connection, and, similarly, he conceives that the oscillations in the receiver may be adversely affected by its metallic connection with the coherer circuit, and he therefore links the circuits of the receiver and coherer respectively by means of an ordinary transformer.

If the claiming clauses of the specification be examined it will be found that the first and second relate to the compromise to which I have referred, and cover the introduction of inductance

coils between the two capacity areas of both transmitter and receiver, for the purpose of enabling the one to create and the other to accumulate the effect of a series of waves. The third, fourth, and fifth claims relate to the means employed by the patentee of tuning the transmitter to a single receiver or to different receivers at different receiving stations, and of enabling the same instrument to be used either as a transmitter or receiver. The sixth claim relates to the means employed by the patentee of charging his transmitter by impulsive rush without metallic connection with the source of supply. The seventh claim is for a combination including two capacity areas of a particular shape, means for tuning them, a coherer circuit completed through one or both of them, and means enabling the capacity areas to be used either as a transmitter or receiver. The eighth claim is for a particular sort of coherer which I gather is not now in use. The ninth claim relates to the linking of the coherer circuit with the receiving circuit through a transformer to avoid metallic connection. The tenth claim is for the particular arrangements at the receiving end which are disclosed by the patentee, and the eleventh claim is for the arrangements and combinations constituting the system disclosed by the patentee as a whole.

It is, in my opinion, beyond dispute that the system of wireless telegraphy disclosed by the patent in question was one of great merit, and, so far as concerns the utilization of the principle of resonance and the consequent possibility of securing that selectivity which is indispensable for practical purposes, constituted a great advance on Marconi's 1896 patent. It is equally certain that the patentee has been inadequately remunerated. There have been various causes contributing to this result. It naturally required time and money to put the system into operation on a commercial scale. Further, at the date of the patent a really satisfactory coherer had yet to be invented, and this was only done after experiments extending over several years. Lastly, the owners of the patent have been seriously embarrassed by the Post Office monopoly, and I understand have not yet been able to obtain the licence necessary for working the system in this country.

PARKER J. 1911 LODGE'S PATENT, *In re.*

The case, therefore, is one in which the Court would naturally incline towards granting some extension of the patent, and I may observe that no one has appeared to oppose such extension.

The Solicitor-General, on behalf of the Crown, has, however, pointed out that all systems of wireless telegraphy at present in use involve precise tuning, and that such tuning is rendered possible only by removing the coherer from the path of the receiving circuit, and is usually effected by means of adjustable inductances, and, further, that in most cases means are employed for enabling the same instrument to be used either as transmitter or receiver. He further pointed out that the patentee has never taken any step to prevent this being done, and he suggested that any prolongation of the patent might seriously embarrass the development of wireless telegraphy in this country, more especially as the patentee has no corresponding patent in other countries, with the exception of the United States of America. In my opinion these considerations cannot be disregarded, and are not entirely met by the offer of the petitioners to grant a licence to any one who desires a licence on reasonable terms, to be settled by the Board of Trade or some expert appointed by the Board of Trade.

With regard to removing the coherer from the circuit of the receiver and placing it in a derivative circuit, the patentee in his evidence laid great stress on this point, but I cannot find that there is any separate claim directed to this portion of his system, although there is a separate claim for connecting the circuits of the receiver and coherer through a transformer to avoid metallic connection. I think it probable that this omission was intentional, and was due to the patentee's experiments with syntonic Leyden jars, published in *Nature* in 1890 and referred to in his provisional specification. It is true that these experiments appear to have been operated by means of the lines of force in the magnetic field, and not by ether waves. But in his lecture before the Royal Institution in 1894 the patentee shewed the same experiments as illustrative of how the principle of resonance might be utilized in connection with ether waves but for the fact that, if the circuits were opened out so as to become good radiating or absorbing circuits, there would be no train of waves on which such principle could operate at all. Given,

however, a radiating circuit which would create, and an absorbing circuit which would accumulate, the effect of a train of waves, the removal of the coherer from the path of the receiving circuit would be as necessary as it was in the case of the syntonic jars; and I doubt whether the adaptation of the device shewn in the syntonic jars experiments to open radiating or absorbing circuits could be considered a great invention.

With regard to tuning, in the sense of varying the natural frequency of a circuit, it had been long well known that this could be done by varying either the induction or the capacity, or both the capacity and the induction of the circuit. For tuning his syntonic jars the patentee had provided means for varying the induction. Under these circumstances, again, I cannot think that tuning by means of induction coils, switched in or out, as desired, or by means of adjustable induction coils, can be considered in itself a great invention. Once again, I cannot think that there was any great invention in bridging over the spark gap of a transmitter so that it could be used as a receiver. The essence and merit of the patentee's invention appear to me to lie in his conception of the compromise which enabled full use to be made for the first time of the principle of resonance.

I have come to the conclusion that it is open to me, on the true construction of s. 18 of the Act, to extend a patent as to one or more of its claiming clauses without extending it as to all the claiming clauses, and, under all the circumstances, I think the justice of the case will be satisfied if I order the grant to the patentee of a new patent, to extend for seven years from the expiration of the existing patent, and to be confined to claims 1, 2, 6, 7, 9, 10, and 11 of the existing patent, such grant to contain a proviso or condition making it incumbent on the patentee to grant licences to all who desire to make use of the protected invention on such terms as a duly qualified arbitrator, to be nominated by the Board of Trade, shall think fair and reasonable; and I am prepared, therefore, to make an order to that effect.

Solicitors: *Farrar, Porter & Co.; Solicitor to the Board of Trade.*

F. E.

EVE J.
1911
May 3.

In re SIR S. M. MARYON-WILSON'S ESTATE.

[1911 M. 245.]

Trustees — Investment — Stocks or Securities of any "British Colony or Dependency" — Definition — Established Expression — Provinces of the Dominion of Canada—"Colony"—Colonial Stock Acts, 1877 *to* 1900—*Interpretation Act*, 1889 (52 *&* 53 *Vict. c.* 63), *s.* 18, *sub-s.* 3.

The trustees of a will had power thereunder to invest capital moneys arising under the Settled Land Acts in the stocks or securities of any "British colony or dependency."

The question having been raised, upon summons, whether the stocks issued by the several provinces of the Dominion of Canada came within this description:—

Held, that the trustees were not authorized to invest in any of these provincial stocks, inasmuch as the expression "British colony or dependency," or its equivalent, was well known and firmly established as part of an investment clause to be found in wills and settlements long before the passing of the first of the Colonial Stock Acts, 1877 to 1900, and ought to be construed independently of the definition in those Acts, and be held to mean the aggregation of the provinces and settlements making up the Dominion, and not the individual provinces or settlements which went to make up the Dominion.

Adjourned Summons.

By his will, dated August 1, 1896, Sir Spencer Maryon Maryon-Wilson, Bart., devised certain freehold estates in the counties of Middlesex and Kent, subject to a rent-charge for his wife, to trustees for a term of 2000 years, to the uses therein mentioned in favour of the testator's son, the respondent Sir Spencer Pocklington Maryon Maryon-Wilson, for life, with divers remainders over. The trustees of the will were declared by the testator to be the trustees for the purposes of the Settled Land Acts. And the testator declared that, notwithstanding any restrictions contained in the Settled Land Acts, the following additional powers were conferred upon a tenant for life of the premises thereby settled and on the trustees, that was to say, that capital moneys arising under the Settled Land Acts might be invested in any of the following investments (as well as investments for the time being authorized by any general public Act):—"In the stocks or securities (not payable to bearer) of the

Government of India for the time being, or of any British colony or dependency." The testator died on December 31, 1897, and his will was duly proved. The trustees had in hand a sum of about 5000*l.*, representing capital moneys arising under the Settled Land Acts, and the respondent, as tenant for life in possession under the settlement, desired that they should invest in some or one of certain stocks mentioned in the originating summons, including stock of the provinces of Nova Scotia, Ontario, Quebec, Manitoba, Saskatchewan and British Columbia, in the Dominion of Canada.

The trustees were willing to make the investments if they had power to do so, and an originating summons was accordingly taken out by them asking for the direction of the Court as to whether, as such trustees, they were justified in making the said investments or any of them. The only question was whether each of the several provinces of the Dominion of Canada was a "British colony or dependency" within the meaning of the investment clause in the will.

S. Leeke, for the trustees of the will representing those interested in the inheritance. The sole question is whether the words "British colony or dependency" include the various provinces of the Dominion of Canada. The Colonial Stock Acts, 1877 to 1900, do not apply. The Act of 1900 (63 & 64 Vict. c. 62) authorizes certain investments in colonial stock provided that the conditions therein specified have been fulfilled, but these conditions have not been fulfilled in the case of the provincial stocks in question. They are not issued by a "colony." There is no direct authority upon the point, and it is submitted that the proper Act to turn to for guidance as to the meaning of a "colony" is the Interpretation Act, 1889, according to which (s. 18, sub-s. 3) all the parts of the dominions under a central legislature shall be deemed to be one colony.

W. M. Cann, for the tenant for life. These provinces are colonies in the true sense of the word. A "colony" is defined in the Oxford English Dictionary as "a body of people who settle in a new locality, forming a community subject to or connected with their parent State." If not colonies, these provinces are

EVE J.
1911
MARYON-WILSON'S ESTATE, *In re.*

dependencies. In the same dictionary a dependency is defined as a dependent or subordinate place or territory such as "a country or province subject to the control of another of which it does not form an integral part." The provinces of Canada, Nova Scotia, and New Brunswick were united into one Dominion under the name of Canada by the British North America Act, 1867 (30 Vict. c. 3), and there was power under s. 146 of that Act to admit other colonies or provinces into the Union. By Order in Council of May 16, 1871, British Columbia was admitted into the Dominion and was referred to as a "colony." There is nothing which can deprive a colony of the rights which it had before entering the Dominion. Similar considerations apply to the South African Union and Cape Colony, and also to the colonies of the Australian Commonwealth. The term colony in this will must be construed according to the Colonial Stock Acts, 1877 to 1900, which were passed to facilitate transfers of stock, and not by reference to the Interpretation Act, 1889. In the Colonial Stock Act of 1877 (40 & 41 Vict. c. 59), s. 26, a colony is defined to be "any dominion, colony, island, territory, province, or settlement situate within Her Majesty's dominions . . . . and for the purposes of this Act the whole of the dominion, colonies, islands, territories, provinces, and settlements under one central legislature, and also such part of the said dominion and such of the said colonies, islands, territories, provinces, and settlements as is under a local legislature is deemed to be a colony." The words are very wide and are read in a distributive sense. The words "colony or dependency" must therefore be taken to cover every British possession. That is also borne out by the use of the expression in Davidson's Forms of Precedents. The Interpretation Act, 1889, has nothing to do with the interpretation of wills, but only of Acts of Parliament. These stocks, which are transferable in London, come within the terms of this investment clause.

S. Leeke, in reply. As the provinces in question have not fulfilled the necessary conditions to make these stocks proper for trust investments, they cannot be so treated. The matter is really governed by the Interpretation Act, 1889, where the words of s. 18, sub-s. 3, exactly fit the Dominion.

EVE J., after stating the facts, continued:—The whole point which I have to determine is whether these stocks issued by the several provinces constituting the Dominion of Canada are securities of a "British colony or dependency." The tenant for life argues that each of these provinces is a British colony or dependency—preferably a British colony—and on his behalf it is pointed out that in some recent statutes, more particularly in the Colonial Stock Act, 1900 (63 & 64 Vict. c. 62), which followed upon and amended the Colonial Stock Acts of 1877 and 1892, the provinces are all treated as separate colonies. In the Act of 1877 (40 & 41 Vict. c. 59), s. 26, the definition of the expression "colony" is very wide, and includes the whole of the dominion, colonies, islands, territories, provinces, and settlements under one central legislature, and also such part of the said dominion and such of the said colonies, islands, territories, provinces, and settlements as is under a local legislature. For the purposes of those Acts it is clear that each of these particular provinces is a colony. But on behalf of the trustees it is urged that it is only with reference to those particular Acts that each of these provinces is to be deemed a colony, and it does not follow that the proper interpretation of the expression in this will is the same. They suggest that the ordinary and proper meaning of the expression is to be found in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), where in s. 18, sub-s. 3, the expression is defined as meaning "any part of Her Majesty's dominions exclusive of the British Islands, and of British India," to which is added this qualification, "where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony." The qualification exactly fits the Dominion of Canada. But, as has been pointed out, the Interpretation Act deals with the interpretation to be put upon certain expressions in Acts of Parliament, and does not import the same definition into wills, settlements, or other similar documents.

But the expression "British colony or dependency" is an expression of some antiquity in documents of this nature. It, or its equivalent, "colony or dependency of the United Kingdom," is to be found in Davidson's Precedents, 2nd ed. vol. iii.,

EVE J.
1911
MARYON-WILSON'S ESTATE, *In re.*

"Settlements," published in 1861, at pp. 547 and 583, in vol. iv., "Wills," published in 1864, at pp. 33 and 112, and in what is described as the "standard form" on p. 711 of the 3rd edition, vol. iii., published in 1873. It was therefore a form of expression well known and firmly established as part of an investment clause to be found in wills and settlements long before the first of the Colonial Stock Acts was passed, and in my opinion it ought to be construed independently of and not with reference to the definition in those Acts. Indeed it may be that the definition there to be found was inserted for the very purpose of affixing to the expression a statutory meaning for the purposes of those Acts different to the ordinary accepted meaning. I think, according to its ordinary and natural use, the expression "British colony or dependency" means the aggregation of the provinces and settlements making up the Dominion, and cannot be construed in such a document as this will to mean each of the individual provinces or settlements which go to make up the Dominion.

The trustees, therefore, are right in their contention on behalf of those interested in the inheritance that under this will there is not conferred upon them the power to invest capital moneys upon the securities in which the tenant for life now asks them to invest. In these circumstances I propose to answer the question by saying that the trustees are not authorized to invest in the provincial stocks specified in the schedule to the first question in the summons, or any of them.

The costs of the summons as between solicitor and client must be raised and paid out of the capital.

Solicitors for all parties: *May, How & Chilver.*

G. M.

PARKER J.
1911
March 30.

In re HORSFALL.
HUDLESTON *v.* CROFTON.

[1910 H. 2812.]

Deed—Party joined for Specific Purpose—Inference as to Joinder for other Purposes—Effect of Errors in Recital and Parcels—Power—Appointment.

Where a person joins as a party to a deed for a specific purpose, he cannot from that fact alone be considered as having joined for a totally different purpose, e.g., that of disposing by the deed, or thereby recognizing the disposal, of property which is thereby purported to be dealt with by other parties to the deed.

H. by his will, made in 1855, specifically devised real estate in trust for his daughter E. for life, and gave her a power of appointment over the property amongst her children. He also bequeathed upon similar trusts one-half of his residuary personalty.

E. married in 1858, and on her marriage part of the real estate so devised in trust was conveyed by H. upon trust for her for life, and on her death in favour of her children as she should by deed or will appoint.

H. died in 1861, and in 1871 a part of the real estate so devised in trust which was not included in the settlement was sold under a power in the will, and the proceeds of sale were invested, the investments being held by the trustees of the will together with the investments representing the residuary personalty. In 1891 E. became one of the trustees of the will, and in 1896, immediately before the marriage of S., one of her daughters, E. appointed to S. (subject to her own life interest) one fifth part of her share in the residuary personalty. The deed contained an erroneous recital that by the settlement on E.'s marriage H. had conveyed all the specifically devised real estate upon the trusts contained in that settlement for the benefit of E. and her children. On the next day by the marriage settlement of S. and F., to which they and E. were parties, S. assigned the one-fifth share to which she was entitled in expectancy on the death of E., under the appointment, in the moiety of the residuary personalty and the investments representing the same, "which investments, so far as they comprise or include such moiety, are specified in the schedule hereto," upon the trusts of the new settlement. The schedule included investments representing the proceeds of the part of the specifically devised real estate which had been sold. The settlement contained a covenant by E. to pay S. an annuity:—

Held, that the appointment by E. extended to a fifth of her moiety of the residuary estate only and not to any part of the proceeds of sale, and that by the joinder of E. as a party to the settlement a share of the proceeds of sale was not appointed or disposed of.

Griffith-Boscawen v. *Scott* (1884) 26 Ch. D. 358, and the decision of

PARKER J.
1911
HORSFALL, *In re.* HUDLESTON *v.* CROFTON.

Lord O'Hagan, L.C. of Ireland, in *Minchin* v. *Minchin* (1871) I. R. 5 Eq. 258, 267, followed.

THOMAS HORSFALL (who died on July 11, 1861), by his will dated May 24, 1855, devised certain real estate in Yorkshire to trustees on trust to pay the rents and profits thereof to his daughter Emmeline Horsfall for her life, for her separate use, and on her death on trust for such one or more, exclusively of the other or others, of her children, or remoter issue born in her lifetime, as she should by deed or will appoint, and in default of appointment on trust for her children at twenty-one or marriage. And the testator thereby empowered the trustees, with Emmeline's consent, to sell all or part of the property devised, and gave his residuary personalty on trust for investment, and to hold the investments, subject to the payment of an annuity to his wife, for all his children living at his death in equal shares, the share of a daughter to be held on the trusts of the real estate devised in trust for her and her issue. The will contained a similar devise in favour of his other child Sophia.

In 1858, in the testator's lifetime, Emmeline married one Gethin, and by the settlement made in contemplation of her marriage the testator conveyed part of the real estate devised in trust for her on trust for her for her life for her separate use, and on her death on trusts in favour of her children by Gethin and any other husband as she should by will appoint.

Both the testator's daughters survived him, and Emmeline, on Gethin's death, married one Hudleston. She had six children only.

Part of the testator's real estate devised in trust for her, but not included in her settlement, was in 1871 sold under the power contained in the will, and the proceeds of sale were invested. The investments were included amongst those held by the trustees of the will, and no accounts were kept distinguishing these investments from those in which the residuary estate was invested.

In 1891 the surviving trustee of the will died, Emmeline being an executrix of her will, and no new trustee of the testator's will was appointed until 1906.

In 1896 Sophia Hudleston, one of Emmeline's children, was married to one Pollard, and Emmeline, by a deed poll dated

April 13, 1896, appointed to Sophia Hudleston (subject to her own life interest therein) one fifth part of one moiety of the residuary personal estate of the testator and the investments representing the same. This deed recited the devise in favour of Emmeline and the gift in her favour of a share in the residuary estate, the death of the testator, the number of Emmeline's children, and the intended marriage with Pollard, and contained an erroneous recital that by Emmeline's marriage settlement the testator had conveyed all the real estate devised by his will on trust for her and her issue on trusts contained in the settlement for her benefit and that of her children.

By the settlement, dated April 14, 1896 (in which Emmeline joined as a party), made on the marriage of Sophia Hudleston and Pollard, it was recited that under the will of the testator and the deed poll Sophia Hudleston was entitled, expectant on the death of her mother, to one equal fifth part of one moiety of the testator's residuary personal estate and the investments representing the same, and that on the treaty for the marriage it was agreed that such settlement should be executed as was thereinafter contained; and it was thereby witnessed that Sophia Hudleston, with the approbation of Pollard, assigned to the trustees of the settlement all that the one-fifth share to which she was entitled in expectancy on her mother's death under and by virtue of the appointment of and in all that one moiety of the residuary personal estate of the testator and of and in one moiety of the investments representing the same, "which investments, so far as they comprise or include such moiety, are specified in the schedule hereto," to be held on trusts in favour of Mr. and Mrs. Pollard and the issue of the marriage. Emmeline covenanted with the trustees and with Sophia Hudleston for payment to the latter of an annuity.

The schedule referred to was in two parts. The first part was headed "Investments representing part of the residuary personal estate of the testator Thomas Horsfall one fifth of a moiety whereof subject to Mrs. Hudleston's life interest therein is intended to be settled by the above written indenture." The second part was headed "Investments representing the moiety

PARKER J.
1911
HORSFALL, *In re.* HUDLESTON *v.* CROFTON.

to which Mrs. Emmeline Hudleston is entitled for life of other part of the residuary personal estate of the said Thomas Horsfall deceased one fifth whereof subject to Mrs. Hudleston's life interest therein is intended to be settled by the above written indenture."

The investments described in the schedule included not only those which represented the residuary personal estate of the testator, but also those which represented the proceeds of the sale of the real estate which had been sold.

Emmeline died on February 3, 1910, having by her will appointed all the investments representing the proceeds of the real estate which had been sold in favour of three of her daughters not including Mrs. Pollard.

The trustee of the testator's will took out an originating summons to have it ascertained and declared what part of the investments held by him as such trustee represented the proceeds of the sale referred to, and for the determination of the question whether, on the true construction of Mr. and Mrs. Pollard's marriage settlement, any share or interest in the proceeds of sale was comprised in the settlement in addition to the share of Mrs. Pollard in the residuary estate of the testator.

T. T. Method, for the plaintiff.

Martelli, K.C., and *P. F. Stokes*, for the trustees of Mr. and Mrs. Pollard's settlement. If an intention is established to pass property which is the subject of a power, a Court of Equity will give effect to the disposition and hold that the property passes under it, although the intention to dispose of it by means of the power is not shewn: *Carver* v. *Richards*. (1) A recital may shew an intention and agreement of the parties and amount to an informal but valid appointment: *Poulson* v. *Wellington* (2); *Wilson* v. *Piggott*. (3) In *Minchin* v. *Minchin* (4) Christian L.J. correctly laid down the principle applicable to such a case as this. Mrs. Hudleston shewed an intention to appoint a share in the proceeds of sale of the realty sold, to which the Court will give effect.

(1) (1859) 27 Beav. 488.
(2) (1729) 2 P. Wms. 533.
(3) (1794) 2 Ves. Jun. 351.
(4) I. R. 5 Eq. 258, 272.

Romer, K.C., and *Austen-Cartmell*, for the appointees under Mrs. Hudleston's will. In *Minchin* v. *Minchin* (1) Lord O'Hagan L.C. points out that the intention must belong to the individuals whose execution of the power is necessary to effectuate that personal intention, and that in none of the cases "was the intent of one person imputed to another; and in none was the mere fact of joinder in a deed held to make all joining in it affected by the separate purposes and acts of each, though those acts and purposes, however tending to one end, were, per se, as unconnected as if they had been demonstrated in various instruments."

There must be shewn on the part of the donee of the power either an intention to dispose of the property subject to it or a recognition that the property has been disposed of. No such intention has been shewn on the part of Mrs. Hudleston. The deed poll shews her intention to retain everything except the one-fifth of a moiety of the residuary personalty which was thereby actually appointed.

Mrs. Hudleston only joined as a party to the Pollard settlement in order to covenant to pay an annuity, and this concurrence did not amount to an exercise of any power even although the schedule comprised the securities on which the proceeds of the realty sold had been invested: *Griffith-Boscawen* v. *Scott.* (2)

Martelli, K.C., in reply.

PARKER J. The testator, Thomas Horsfall, by his will devised real estate on trust for his daughter Emmeline for life, and on her death for her children or remoter issue as she should appoint, and in default of appointment for her children at twenty-one or marriage. He gave his residuary estate on trust for his two daughters, Emmeline being one of them and her share being settled in the same way as the realty devised on trust for her. She married in his lifetime, and by her marriage settlement a portion of the real estate devised by the will was settled on her. As to the real estate so settled the devise was inoperative; but part of the real estate was left on which the devise could operate. She had various children, one of whom was a daughter

(1) I. R. 5 Eq. 258, 267. (2) 26 Ch. D. 358.

PARKER J. 1911 HORSFALL, *In re.* HUDLESTON *v.* CROFTON.

Sophia. The latter in 1896 married a Mr. Pollard, and on her marriage her mother, then Mrs. Hudleston, made an appointment in her favour. By it she recites the will of her father, both as to the property specifically devised to her and as to the residuary gift; and she recites her father's death, and that by the settlement on her own marriage her father conveyed all the real estate devised by his will on trusts for her and her children. That last recital was erroneous, for some of it was not comprised in the settlement. Then comes a recital from which it appears that she had children, of whom Sophia was one; and by the operative part of the deed she appoints one-fifth of one-half of the residuary personal estate of the testator to Sophia absolutely. At the date of this appointment Mrs. Hudleston was a trustee of the testator's will; and many years before—in 1871—a portion of the realty subject to the devise to her, and not comprised in her marriage settlement, had been sold under a power in the will and the proceeds invested, and they remained in the names of the existing trustees of the will, of whom, as I have said, Mrs. Hudleston was one.

The question is whether, having regard to the recitals in the deed poll and the subsequent marriage settlement of her daughter, Mrs. Sophia Pollard, I must construe the appointment as an appointment not only of part of the residuary personal estate of the testator, but also of part of the proceeds of sale of the real estate, over which Mrs. Hudleston had a similar power of appointment. As I have already said during the argument, I think that the best way of putting their case for those contending that the proceeds of sale of realty were included is this—that Mrs. Hudleston evidently thought that all the real estate subject to the devise had been included in her own marriage settlement, and that the devise had therefore wholly failed, so that it might be argued that she thought that all the property remaining in the hands of the trustees of her father's will was personal estate, and therefore that in appointing his residuary personal estate she intended to include all the funds in their hands. But it might equally be said that she must have known that part of the real estate had been sold, but was ignorant that the proceeds of sale were in her own hands and not in those of

the trustees of her marriage settlement; and that she only intended to exercise the power over the residuary estate. Looking at the matter in either of these two ways, one can only speculate as to what she really intended to do; and therefore, on the deed poll alone, I think I ought to say that she exercised the power only over the residuary estate, which she appoints in express terms.

But on the marriage settlement of her daughter, Mrs. Pollard, which is dated the day after the deed poll, another point is raised. Mrs. Hudleston herself was a party to this settlement, as well as her daughter. The mother, however, joined only to enter into a covenant to pay an annuity. The deed is an ordinary marriage settlement, and the daughter joined to convey the property appointed to her.

[His Lordship read the conveyance by her down to the words "are specified in the schedule hereto," and after referring to the schedule and its division into two parts proceeded as follows:] It is clear, therefore, that, as far as the settlors were concerned, they thought that they were settling one-fifth of one-half of the investments in the first part of the schedule, and one-fifth of all those in the second part; and, looking at the deed, that suggests that there had already been a partial distribution of the estate, and that the investments in the second part of the schedule had been appropriated to Mrs. Hudleston. But many, if not all, of those investments in the second part of the schedule arose from the sale of the real estate not comprised in Mrs. Hudleston's settlement, and it is suggested that, since she was a party to her daughter's marriage settlement, that deed should be read as an appointment by her in favour of her daughter of one-fifth of the proceeds of sale of the realty and a settlement by her daughter on the trusts of the settlement of that fifth. In my opinion, I cannot, from the fact that Mrs. Hudleston was a party to the settlement, draw any inference which would justify my doing this. It would be a very dangerous doctrine to lay down that if a person joins in a deed for a limited purpose he must be taken to have read and made himself responsible for all the other parts of the deed. Moreover, on the authorities—and especially *Griffith-Boscawen* v. *Scott* (1) and the judgment

(1) 26 Ch. D. 358.

PARKER J. 1911 HORSFALL, *In re.* HUDLESTON *v.* CROFTON.

of the Lord Chancellor of Ireland in *Minchin* v. *Minchin* (1)—if I am to gather or deduce from a deed of this sort an actual intention to make an appointment, it can only be done where the donee of the power evidently intends to deal with the property, not in the case of a deed where, though the donee of the power was a party, it is clear that he had no intention of dealing with the property, but intended something quite different. That really states in another form what I have already said, that where a person joins as a party to a deed for a specific purpose he cannot be considered as having joined for a totally different purpose. If the deed poll did not include the proceeds of sale of any real estate, I ought not to deem such proceeds to have been included in this subsequent settlement, which I do not know that Mrs. Hudleston even read; and I cannot hold that, in joining in it, she had any intention other than appears. I am, therefore, thrown back on the deed poll itself, and I do not think I can hold that Mrs. Hudleston appointed the proceeds of sale of the realty, unless I am clearly satisfied that she intended to deal with such proceeds. The circumstances are consistent with her having known that there were proceeds of sale of realty, and having intended to confine the appointment to the personal estate, despite her erroneous idea as to the real estate devised to her.

I hold, therefore, that as far as concerns the securities in the schedule representing proceeds of sale of realty the appointment is inoperative, and there must be the inquiry asked for by the summons.

Solicitors: *Patersons, Snow, Kinder & Lawson, for H. J. Jeffery, Bradford; Maples, Teesdale & Co., for Mossman, Rawson & Co., Bradford; J. Jobson.*

(1) I. R. 5 Eq. 258, 267.

F. E.

NASH *v.* LAYTON.

[1910 N. 327.]

C. A. 1911 March 25.

Practice — Discovery — Interrogatories — Material Facts—Loan—Defence that Plaintiff was a Money-lender and was not registered—Interrogatories as to previous Loan Transactions—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *ss.* 2, 6.

An action was brought to enforce a charge given by the borrower to secure a loan with interest at 10 per cent. upon certain surplus moneys held on his behalf by the trustees of a private Act of Parliament which authorized them to raise a fund for the payment of the borrower's debts existing at the date of the Act. The trustees, who were defendants to the action, raised the defence that the plaintiff was a money-lender within the meaning of the Money-lenders Act, 1900, and was not registered under that Act:—

Held (Fletcher Moulton L.J. dissenting), that these defendants were entitled to administer interrogatories to the plaintiff as to what (if any) other loans he had transacted during a reasonable period before the loan in question in the action, and on what security and at what rate of interest, and generally as to the circumstances and terms of such loans, as being facts relevant to the issue raised by the defence; but that they were not entitled to require the plaintiff to disclose the names of the borrowers.

Marriott v. *Chamberlain* (1886) 17 Q. B. D. 154, discussed.

Appeal from a decision of Joyce J.

The action was brought to enforce a charge dated October 23, 1906, given by Sir Humphrey Francis de Trafford to the plaintiff. The plaintiff was a London tailor. Sir Humphrey de Trafford was adjudicated a bankrupt in December, 1909, and his trustee in bankruptcy and the trustees of the de Trafford Estate Act, 1904, were defendants to the action. The facts as alleged by the statement of claim were shortly as follows:—

By the de Trafford Estate Act, 1904, the trustees appointed for the purposes of the Act were authorized to raise a sum not exceeding 80,000*l.* for the purpose of paying Sir Humphrey's then existing debts. Shortly after the passing of the Act the trustees received from Sir Humphrey the sum of 9840*l.* odd for the payment of his debts, and they also raised the sum of 80,000*l.* for the same purpose. After discharging all the unsecured debts and liabilities of Sir Humphrey existing at the

C. A. 1911 NASH v. LAYTON.

date of the passing of the Act there remained in the hands of the trustees at the date of the plaintiff's charge a balance of 1036*l.* 11*s.*

In 1904 Sir Humphrey was also liable as a contributory to the Empress Assurance Corporation, which was in liquidation, and to meet this liability a sum of 1200*l.* was placed on deposit with the Union of London and Smiths Bank to the joint account of the trustees of the Act and de Westley Layton, the liquidator of the company. A sum of 192*l.* was withdrawn from this 1200*l.* to meet a call made in the liquidation, but no further sum had been required, and on or before the date of the plaintiff's charge the liquidator released in favour of Sir Humphrey 750*l.* out of the balance of 1008*l.* then standing at the bank. The liquidator was made a defendant to the action, but all proceedings had been stayed against him.

On October 23, 1906, Sir Humphrey wrote to the plaintiff as follows:—

"In consideration of your discounting my promissory note for 750*l.* dated this day and payable six months after date the proceeds of which less an agreed amount for interest and commission I hereby acknowledge to have received, I hereby as beneficial owner charge in your favour to secure payment of such promissory note and interest from the due date at the rate of 10 per cent. per annum all or any moneys in the hands of the trustees of the de Trafford Estate Act belonging to me and particularly a balance of 1036*l.* 11*s.* 0*d.* in their hands the balance of an account rendered by the trustees to me of a certain sum of 80,000*l.* and certain income and moneys received on my behalf also I charge in your favour to secure payment of the promissory note and interest as aforesaid a sum of 750*l.* standing in the names of the trustees of the de Trafford Estate Act at the Union of London and Smiths Bank (Charing Cross) which I claim to be entitled to as part of a deposit released by the defendant de Westley Layton in my favour. For the same consideration I hereby charge the aforesaid money in the hands of the trustees of the de Trafford Estate Act and the said sum of 750*l.* with payment to you of all and any moneys which may be owing to you by me on any account whatsoever and more

particularly with payment of the premium on a policy for 1000*l.* on my life which I have deposited with you as collateral security for payment of the above promissory note for 750*l.* and interest as aforesaid and I agree at my own expense to execute a more formal document for confirming the above charge if and when called upon by you to do so."

The amounts due under this charge for principal and interest at the date of the action were alleged by the plaintiff to exceed 3000*l.*

The plaintiff claimed an account of the moneys in the hands of the trustees and enforcement of his charge by payment or otherwise. The trustees of the de Trafford Estate Act disputed this charge and by their defence they alleged (among other defences) at par. 11 as follows:—"The plaintiff is and at the date of the alleged charge of the 23rd of October, 1906, was a money-lender within the meaning of the Money-lenders Act, 1900, and he is not and was not registered as a money-lender under that Act and by reason thereof his alleged charge is illegal and cannot be enforced."

These defendants administered the following interrogatories for the examination of the plaintiff:—

"1. Have you and whether alone or in conjunction with or in the name or through the agency of any other person or persons or corporation made any and if so what loan or loans on promissory note or bill of exchange or I.O.U. or other and what security during the year 1906 and the three preceding years other than the loan on promissory note to Sir Humphrey Francis de Trafford in the statement of claim mentioned and if so what were the respective dates of such loans and the respective dates for repayment and what in each case was the amount made payable on each such promissory note or bill of exchange or I.O.U. or other security and the actual amount paid in cash in each case in respect thereof and what in each case was the rate of interest payable and the commission (if any) charged or deducted?"

"2. Did you on any and if so on what occasion or occasions lend money under the name of Leslie or under any other name other than your own name?"

C. A. 1911 NASH v. LAYTON.

[No. 3 was not insisted on upon the appeal.]

"4. Are you and have you been registered as a money-lender under your own or any other and what name under the Money-lenders Act, 1900, and if so when?"

The plaintiff objected to all these interrogatories, and Joyce J. held that they were inadmissible.

The defendants the trustees of the de Trafford Estate Act appealed.

Upon the appeal, at the suggestion of the Court, the appellants agreed that the period of three years mentioned in the first interrogatory should be reduced to, say, twelve months.

Jenkins, K.C., and *Arthur Lee Ellis*, for the appellants. These interrogatories seek the disclosure of facts material to an issue in the action and they are therefore admissible according to the principle of *Marriott* v. *Chamberlain*. (1)

Upjohn, K.C., and *W. H. Cozens-Hardy*, for the respondent. It is settled law that interrogatories as to the evidence of facts in dispute as distinguished from the facts themselves are not admissible, as appears from *Marriott* v. *Chamberlain* (1) itself. The first interrogatory relates merely to evidence of the fact whether the plaintiff is carrying on the business of a money-lender, and it is oppressive since it seeks to compel the plaintiff to disclose transactions of a peculiarly private nature with third parties who have no connection with the action. There is nothing in the nature of the loan in question in this action or elsewhere in the pleadings to suggest that the plaintiff is a money-lender, and this is a mere fishing interrogatory. Joyce J. was quite right in refusing to admit these interrogatories.

Jenkins, K.C., in reply.

COZENS-HARDY M.R. This is an appeal from an order of Joyce J., and it raises a question of some importance and one as to which I am sorry to say the Court are not unanimous. But in my view the appellants, the defendants, are entitled to an answer from the plaintiff in substance to interrogatory No. 1 with the variations which have been suggested partly by the

(1) 17 Q. B. D. 154.

Bench and partly by counsel for the appellants. Now the case is one of this kind. The plaintiff holds a charge dated in October, 1906, from Sir Humphrey de Trafford to secure a loan with interest at 10 per cent. Sir Humphrey de Trafford, after various pecuniary difficulties, has finally become a bankrupt, and this is an action in which the plaintiff claims an account against the trustees under the de Trafford Estate Act, 1904, of moneys which the plaintiff says they hold for Sir Humphrey de Trafford and which are subject to the plaintiff's security. Amongst other defences which are raised to the action is this: "The plaintiff is and at the date of the alleged charge of the 23rd of October, 1906, was a money-lender within the meaning of the Money-lenders Act, 1900, and he is not and was not registered as a money-lender under that Act and by reason thereof his alleged charge is illegal and cannot be enforced." We have been told that that is a very odd defence for a person who is not party to the loan to raise. I do not follow that. To my mind it is perfectly clear that a subsequent incumbrancer, or anybody who is interested in saying that a charge is bad as falling within the Money-lenders Act, is perfectly entitled to raise that defence. The Money-lenders Act does not merely give a remedy to the borrower against the lender; it strikes at the charge itself, if it comes within it, and renders it one in respect of which no one can get relief. If that is so, one of the issues in the case is whether the plaintiff is a money-lender, a phrase which is thus defined in s. 6: "The expression 'money-lender' in this Act shall include every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business; but shall not include" various exceptions upon which nothing turns. In substance the issue on this part of the case is whether the plaintiff is a person whose business was that of money-lending. A man may have more businesses than one. It will not be disputed that a gentleman who like the plaintiff is a tailor might be both a tailor and a money-lender. The question is whether he is or is not in that position. The defendants who raise this issue say: We want to know whether at the date of the impeached document, that is

C. A. 1911 NASH v. LAYTON. Cozens-Hardy M.R.

in October, 1906, and within a reasonable period before that date, say twelve months, you did or did not lend money on I.O.U.'s, promissory notes, and so on; whether you renewed them, on what terms you renewed them, whether the loans were at a usurious rate of interest, and so on; all of which inquiries as it seems to me are not only relevant but are not going beyond what is necessary to establish the proposition that the plaintiff is a money-lender and therefore subject to the Act. But it is said that this is mere evidence of a fact and that you cannot interrogate as to mere evidence of facts in dispute. I think it is much more than that. As I read the judgment of Lord Esher in *Marriott* v. *Chamberlain* (1), it directly and expressly covers this point. He says there, "The law with regard to interrogatories is now very sweeping. It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call, and their names not forming any substantial part of the material facts; and I think we may go so far as to say that it is not permissible to ask what is mere evidence of the facts in dispute, but forms no part of the facts themselves. But with these exceptions it seems to me that pretty nearly anything that is material may now be asked. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue." It seems to me that the facts which are the subject of the interrogatory here are substantially relevant to the existence or non-existence of the fact whether the plaintiff was carrying on at the critical period the business of a money-lender. But I desire to go further. I am not satisfied that this is in the true sense of the word a mere question of fact. No doubt the facts have to be ascertained, but as at present advised I think it would be more accurate to say that it is a question of law arising from those facts whether the plaintiff is or is not carrying on the business of a money-lender. We are very familiar in this Court with a distinction of this nature in appeals under the Workmen's Compensation Act. No appeal can lie to us except upon a question of law, but on the facts which are found by the

(1) 17 Q. B. D. 154, 163.

county court judge or the arbitrator, he having found the facts on which he says the particular case is or is not within the Act, the matter comes up to us to review his decision upon the question of law whether the matter does or does not fall within the Act. For example in a case under the Act of 1897 the county court judge found as a fact that a ladder used in the construction of a building was used as a scaffold. Upon that finding it was a question of law for us to decide whether a ladder could be a scaffolding within the language of the Act.

For these reasons I see no objection to this interrogatory, and I am not alarmed at the prospect which is held out to us that this may be most oppressive and unfair in other cases. I trust with absolute confidence the judges who deal with these interlocutory matters not to allow interrogatories under this Act or under any other Act to be used except on proper occasions and with due safeguards against oppressiveness. In my opinion the defendants are entitled to interrogate in substance in accordance with the first interrogatory here with the amendments or variations which have been suggested, but before the order is made it would, I think, be reasonable that the counsel on both sides should settle the terms of the interrogatory. The appeal will be allowed.

Fletcher Moulton L.J. I am of the contrary opinion. In my opinion the interrogatory, whether in the shape in which it is before me or in the shape into which it is proposed to change it, is one which the Court ought not to allow. I think that it is oppressive and that it goes beyond the legitimate province of interrogatories. Let us consider what this case is. The plaintiff is suing in respect of a charge which he obtained under a document dated October 23, 1906. That document shews that the charge is in respect of moneys then due to him from Sir Humphrey de Trafford and also of a loan with interest at 10 per cent. per annum which he made to Sir Humphrey at that date. There is nothing in this which points to the plaintiff carrying on the business of a money-lender. It is a loan which a person might have made who had by no means any intention of carrying on and who did not in fact carry on the business of a money-lender.

C. A. 1911 — NASH v. LAYTON. — Fletcher Moulton L.J.

One of the defences raised is an allegation that the plaintiff is a money-lender not registered under the Act. [His Lordship read par. 11 of the defence.] Of course it is open to any defendant to raise that defence against any claim in respect of money due or a charge to secure a loan. He is not required to shew that there are grounds for raising this particular defence or any other defence, and in this case there is not a particle of evidence before the Court that this is anything more than a speculative defence. We have to treat this, therefore, as a perfectly general case, and we have to ask ourselves, Is such an interrogatory to be allowed whenever such a plea is raised? I emphatically protest against any other matters not in evidence being taken into consideration by this Court. If it is right to allow this interrogatory in the case of this particular plaintiff, against whom nothing is said and in support of whose carrying on business as a money-lender there is no material before the Court, it is an interrogatory which the Court not only can but ought to allow in the case of a like defence being raised against any other person. I ask myself, therefore, whether such an interrogatory is in accordance with the practice of the Court and with the rules that have been laid down for its guidance in relation to its discretion as to admitting interrogatories.

In the first place I feel (and I admit that this influences me very considerably) that to permit this interrogatory is to allow a defendant before the trial to compel the disclosure by the plaintiff of transactions with which the defendant is in no wise connected, but which are entirely between the plaintiff and other persons. Many loans, charitable or otherwise, are made by persons who are carrying on ordinary forms of business and even by private persons in the course of their life. Prima facie a man has a perfect right to make such loans, and prima facie it appears to me oppressive to allow an interrogatory before the trial compelling the disclosure of such matters which concern only the plaintiff and third parties and with which the defendant has nothing to do. Therefore, unless the Court sees strong ground for permitting such an interrogatory, I think it is its duty not to permit it. Now what are the grounds? It is said that an issue in this case is whether the plaintiff is carrying

on a money-lending business. I quite agree ; and I quite agree that when the case comes on for trial it will be relevant to cross-examine the plaintiff, if he is put into the box, as to what loan transactions he has carried on, in order to see whether or not the evidence that he gives of what he does is sufficient to justify a jury in finding as a fact that he is carrying on business as a money-lender. But that is an issue of fact, and individual instances in which he lends money and the circumstances under which those loans are made and the terms of those loans are not matters in issue in the case. They are at best mere evidence in the issue whether or not he carries on business as a money-lender and they may be of so neutral a character as not to be evidence at all upon such an issue. There is no statutable definition of carrying on business as a money-lender except that a money-lender in the Act includes every person whose business is that of money-lending, and any one who advertises or announces himself or holds himself out in any way as carrying on that business, with certain exceptions set out in s. 6 of the Money-lenders Act and known as a, b, c, d, and e. That being an issue of fact, if this action were being tried at nisi prius, the judge would have to direct the jury that if they could find that this man advertised or announced himself or held himself out as carrying on that business they must find he is a money-lender, unless he came within one of the specified exceptions ; and then he would have to explain to them what would be adequate to establish that his business was that of money-lending. They would then have to consider each bit of evidence that had been put before them. These individual transactions might be evidence in favour of the one or the other party in the issue, and it would be for the jury to consider the matter and bring in a verdict on a proper direction of the judge as to whether this man was or was not a money-lender. This is the issue, and no transaction between this plaintiff and any third person is a matter in issue in the cause. It may or may not be evidence of one of the issues of fact, but it is evidence only.

Now let me take the case to which we have been referred as the locus classicus on the question of interrogatories, *Marriott* v.

C. A. 1911 NASH v. LAYTON. Fletcher Moulton L.J.

Chamberlain. (1) The actual interrogatories there were relevant in the closest way to the actual transaction referred to in the libel. There was no attempt there to seek discovery as to transactions unconnected with the matter in issue in the cause but tending by way of evidence to establish some issue which it was for the plaintiff or the defendant to make out. There was no attempt there to seek discovery as to matters between the plaintiff and third parties which had nothing to do with the actual issue in the cause. Now what does Lord Esher say? He says "The law with regard to interrogatories is now very sweeping. It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call, and their names not forming any substantial part of the material facts; and I think we may go so far as to say that it is not permissible to ask what is mere evidence of the facts in dispute, but forms no part of the facts themselves." I do not think any language could be chosen which more precisely sets forth the material distinction that I wish to embody in my judgment. I say that these loans are no part of the facts themselves at issue in the cause. I admit they may be evidence of one of the facts in dispute, namely, whether the plaintiff carries on the business of a money-lender, and that if there are a large number of these loans, that fact may go far to establish that he is carrying on such a business. But many of them may turn out to be no evidence at all. They may be loans under circumstances which do not bear on the question. Not even the worst of them is a matter in issue in the cause. It is only evidence as to whether he is carrying on business as a money-lender. That is the first thing that Lord Esher says. He then goes on: "But with these exceptions it seems to me that pretty nearly anything that is material may now be asked. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue." Now if that is to be taken in the full breadth of the language used it is a logical contradiction of that with which he had commenced. He is laying down the limitations beyond which

(1) 17 Q. B. D. 154, 163.

the Court may not go, and if it is to be said that he lays down that it is legitimate to interrogate as to "any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue"—giving the full meaning to those words—it would include everything that could be evidence of the facts, and it would be a direct contradiction of what he had previously said, "that it is not permissible to ask what is mere evidence of the facts in dispute." My opinion is that Lord Esher was quite right when he said "it is not permissible to ask what is mere evidence of the facts in dispute, but forms no part of the facts themselves," and I say further that if it is on debateable ground, the Court ought to be extremely careful not to allow discovery before action to go into matters between the plaintiff or defendant as the case may be and third parties having no direct connection with the matter in issue in the cause—things which have nothing to do with the actual matter in dispute. But in the present case we are not on debateable ground. The dictum of Lord Esher is clear as shewing that these matters are not admissible as the subject of interrogatories merely because they may tend to prove that the man was carrying on business as a money-lender.

That being so, I do not think I need go into the actual detail of the interrogatory. It asks a man to state before the trial every loan he has made, whether it was on promissory note or bill, whether it was on security, and what interest it was at, or whether it was at no interest at all. It is an inquiry therefore into matters which may and probably will be to a very large extent private matters. I realize that at the trial you could not prevent a counsel, if he was injudicious enough, subjecting the party to a cross-examination as severe as this, but everybody who has any experience of nisi prius would know that if the charge proved to be unfounded such a cross-examination would seriously prejudice the jury against his case. But if we allow these interrogatories we allow cross-examination of that kind before trial, and under circumstances where there will be no such penalty, a penalty which in my opinion ought to exist when counsel avails himself of his position as counsel to submit one of the parties to a cross-examination for which there is no justification. No justification

C. A. 1911 NASH v. LAYTON. Fletcher Moulton L.J.

has been shewn to exist in this particular case. There are no matters connected with the cause of action which give colour to the suggestion that the plaintiff is a money-lender, and I must decline to assist a fishing cross-examination of this kind by allowing it to take place by the methods of discovery instead of at the trial. For these reasons I think that the interrogatory is objectionable in its very nature, and that with no amendment can it be made a proper one.

Buckley L.J. I agree with the judgment delivered by the Master of the Rolls. The only question upon which the Court has to adjudicate is whether an interrogatory such as the first interrogatory here ought to be allowed. To determine that question I think that it is first desirable to clear the ground by saying what it is upon which the defendants have to adduce evidence. It is part of their case that the plaintiff is and at the date of the alleged charge was a money-lender. Is that an allegation of fact? To my mind it is not. Whether a man is a money-lender or not is an investigation whether he has done such a succession of acts as that upon the facts proved by establishing that those acts were done the Court arrives at the conclusion as matter of law that he falls within the definition of a money-lender in the Act of Parliament. An illustration has been put as to finding whether B. is the heir of A. It was suggested that that is a question of fact. To my mind it is not a question of fact. In order to determine whether B. is heir to A. there are many facts which have to be proved. The fact may have to be proved that B. is the legitimate son of A., that he had no elder brother, or if he had an elder brother that that elder brother predeceased him and that B. was the last surviving eldest son of A. That might be the question to be tried; it does not follow that it is. You have still to know whether the lands of which you are speaking are held in free and common socage, or whether they are held in socage subject to the custom of gavelkind, or whether they are held subject to the custom of Borough English, and it is for the judge to lead the jury to find for him the facts, and, when the jury have found the pedigree facts and dates and so on, to direct the jury

that under those circumstances, the land being of such and such a tenure, they must find that B. is or is not the heir of A. It is not a question of fact; it is a mixed question of fact and law. In the particular case here in question what are the facts which have to be proved? I apprehend that to establish that a man is a money-lender the relevant evidence is evidence to prove that he has done such a succession of acts of such a character as that the judge ultimately says, Having ascertained all those facts as to the acts which he did, the times and dates when he did them, the terms which he imposed and so on, the result is that, looking at this Act of Parliament which defines what a money-lender is, I as matter of law hold him to be a money-lender.

If that be so, it seems to me we are relieved from any difficulty in applying Lord Esher's words in *Marriott* v. *Chamberlain*. (1) I do not myself feel any difficulty upon them. Lord Esher simply said this: "It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call, and their names not forming any substantial part of the material facts; and I think we may go so far as to say that it is not permissible to ask what is mere evidence of the facts in dispute, but forms no part of the facts themselves." Suppose for instance the question of fact was whether a man sold sugar. It would be evidence of that fact that A. went to his shop and bought sugar, that B. went to his shop and bought sugar, and so on. But that would be mere evidence on the dispute whether he sold sugar or not. His subsequent sentence is this: "The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue." Suppose the question were not whether the man sold sugar, but whether he sold some other commodity, rare or absolutely unknown at the date in question. Suppose the question were whether he sold radium or whether he sold liquid air. It would be a relevant fact to shew that at the critical date the substance now known as radium was not known at all. It existed, but its

(1) 17 Q. B. D. 154, 163.

C. A. 1911 NASH v. LAYTON. Buckley L.J.

existence was not known. Or as regards liquid air, suppose that nobody had yet invented the process by which it was possible to liquefy air, and therefore the man could not sell liquid air, because there was no liquid air to sell. Under those circumstances the fact that at the critical date there was not known to be such a thing as radium or liquid air would be a fact the existence or non-existence of which would be relevant to the existence or non-existence of the fact in question, namely, whether the man sold the article. I am unable to see any difficulty in that. It seems to me it is perfectly consistent and perfectly intelligible language. I have only to apply it so far as it bears upon this particular case. The question is here whether the man was a money-lender. I think that the defendants are entitled to administer to him a proper interrogatory directed, not to the fact whether he is a money-lender or not, because that is the fact to be proved, but directed to the acts which go to shew whether or not he did such a succession of acts as that it leads to the conclusion in law that he carried on the business of a money-lender. It seems to me that that is the interrogatory which is addressed here. With regard to its exact terms, as I understand, we are not going to settle those now. Under the circumstances it seems to me the interrogatory is right, except that it should be confined, say, to twelve months before October 23, 1906, that it should not call upon the plaintiff to disclose the names of his borrowers, but that it should call upon him to disclose which, if any, of the transactions in question are renewals. I think if counsel put the interrogatory in some such form as that the interrogatory ought to be allowed.

Cozens-Hardy M.R. The costs here and below will be costs in the action.

The first interrogatory in the form in which it was ultimately allowed was as follows :—

Have you, and if so whether alone or in conjunction with or in the name or through the agency of any other person or persons or corporation, made any and if so what loan or loans on promissory note or bill of exchange or I.O.U. or other and what security during the period of twelve calendar

C. A. 1911 NASH v. LAYTON.

months before October 23, 1906, other than the loan on promissory note to Sir Humphrey Francis de Trafford in the statement of claim mentioned, and if so what were the respective dates of such loans and the respective dates for repayment and what in each case was the amount made payable on each such promissory note or bill of exchange or I.O.U. or other security and the actual amount paid in cash in each case in respect thereof, and what in each case was the rate of interest payable and commission (if any) charged or deducted. State whether any and which of the loans within the said period were renewed or were renewals of previous loans, and if so state in each case the date on which the renewal was made. In answering this interrogatory the plaintiff is not required to disclose the name of the borrower.

The remaining two interrogatories were allowed without alteration.

Solicitors: *L. W. Byrne, for Taylor, Kirkman & Co., Manchester; Edward Brandon.*

H. B. H.

In re DEE ESTATES, LIMITED. WRIGHT *v.* DEE ESTATES, LIMITED.

C. A. 1911 SWINFEN EADY J. *Feb.* 24; *March* 1. C. A. *April* 6.

[1902 D. 1296.]

Solicitor—Lien—Mortgage—Retainer by Trustee for Debenture-holders—Trust Deed—Costs incurred prior to Execution of Deed—Claim by Debenture-holder.

A company determined to issue mortgage debentures to be secured by a trust deed, and a trustee was proposed. The proposed trustee, who on the execution of the trust deed became the trustee for the debenture-holders, retained a solicitor to act for him in connection with the trust (the company being represented by another solicitor), and under this retainer the solicitor investigated the title of the trust property and approved the trust deed on behalf of the trustee:—

Held, that the solicitor was entitled, both as against the trustee and as against the debenture-holders, to a lien on the trust deed for all costs properly incurred in relation to the trust, notwithstanding that they were incurred before the execution of the deed.

Summons to review taxation.

The above-named company was incorporated on September 30, 1897, to acquire and deal with certain lands in Chester and Flint. The capital was 425,000*l.* divided into 175,000 1*l.*

C. A. 1911

DEE ESTATES, LIMITED, *In re.*

WRIGHT *v.* DEE ESTATES, LIMITED.

preference shares and 250,000 1*l.* ordinary shares. The company also determined to issue 1750 first mortgage debentures for 175,000*l.* to be secured by a trust deed vesting all the company's lands in trustees for the debenture-holders.

The persons first suggested as trustees were Smith and William Wright, and in September, 1897, the firm of T. & A. Priestman were retained by Smith and William Wright to act as their solicitors in all matters connected with the said trust. Smith and William Wright required certain investigations and inquiries to be made by the solicitors into the title to the lands and into matters connected with the company and into the form of the trust deed, and the duties of the trustees thereunder, and into the statements appearing in the prospectus, which the company proposed to issue, before they would execute the said deed.

The prospectus was approved by the solicitors, and gave their names as "solicitors for trustees for debenture-holders," and the names of other solicitors as solicitors for the company. It stated that the purchase price for the lands was 500,000*l.*, payable as to one half in cash and the balance in cash, debentures, or preference or ordinary shares, or partly in one and partly in the other, at the option of the directors, and that "The vendor will pay all expenses of every kind up to and including the completion of the purchase."

The trust deed was also approved by the solicitors. It recited that the company was seised in fee simple of the land. Clause 11 provided that the trustees should hold the moneys to arise from any sale under the trust for conversion upon trust that they should thereout "in the first place pay or retain the costs and expenses incurred in or about the execution of such trust or otherwise in relation to these presents."

Before the engrossment was executed Smith decided not to act, and Ayre was invited to take his place. After inquiring what investigations had been made, he agreed to act as trustee jointly with William Wright. Ayre and William Wright thereupon jointly retained the firm to act as solicitors for them as such trustees. The engrossment was altered accordingly and executed by the company and the trustees on November 4, 1898.

In the events that happened the only actual issue of debentures was to the amount of 70,000*l.* These were all issued to William Wright in satisfaction of certain claims on the lands.

William Wright died on May 14, 1900. Charles Wright and the other plaintiffs were his executors. On July 20, 1901, Charles Wright was appointed a trustee of the trust deed in the place of William Wright. On July 23, 1902, the executors brought this debenture-holders' action against the company and Ayre. Ayre died on August 21, 1905.

On February 3, 1906, an order for sale was made. The plaintiffs' solicitors requested the trustees' solicitors to hand over the trust deed and other deeds in their possession as solicitors for the trustees. The trustees' solicitors claimed a lien for their costs for acting in connection with the before-mentioned investigations and inquiries or otherwise as solicitors for the trustees. Accordingly the trust deed and other deeds were handed over to and received by the plaintiffs' solicitors on June 7, 1906, "subject and without prejudice to Messrs. T. & A. Priestman's lien thereon for costs."

On July 18, 1908, an order was made for the taxation and payment of the costs of the plaintiffs and the late defendant Ayre as between solicitor and client, including in the costs of the plaintiff Charles Wright and the late defendant Ayre any expenses properly incurred by them as trustees of the trust deed and not already taxed or allowed beyond their costs of action. Neither Ayre's executors nor the trustees' solicitors were served with the petition upon which the order was made, or represented at the hearing, and their claim to a lien was overlooked. The trustees' solicitors delivered a bill, but the taxing Master disallowed all charges for work done prior to the trust deed.

On April 22, 1910, an order was made upon the application of the trustees' solicitors and Ayre's executors that it be referred back to the taxing Master to tax and allow in addition to the costs by the said order directed to be taxed all sums (if any) properly payable for costs to the trustees' solicitors for which they had a lien on the documents therein referred to, and also any costs and expenses properly incurred by the trustees of the trust deed or any of them in or about the execution of the trusts

C. A. 1911 — DEE ESTATES, LIMITED, *In re.* — WRIGHT *v.* DEE ESTATES, LIMITED.

or otherwise in relation to the trust deed and not comprised in the said order.

By his certificate dated November 24, 1910, the Master allowed these costs at 307*l.*, being 295*l.* scale fee for investigating title and drawing trust deed and debentures and 12*l.* out of pocket expenses. He did not allow the charges relating to the prospectus.

On October 26, 1910, the plaintiffs carried in objections (*a*) that trustees' solicitors do not acquire a lien upon the title deeds of the trust property in respect of costs incurred prior to the constitution of the trust; (*b*) that the trustees' solicitors never had any lien for the above items; (*c*) that if the trustees' solicitors ever had such a lien it could only be set up against the two trustees who employed them and came to an end on the death of Ayre, the survivor of the original trustees, and could not be claimed against any succeeding trustee who did not employ the trustees' solicitors; (*d*) that in any case the lien could not be set up against the debenture-holders; (*e*) that clause 11 of the trust deed did not apply to costs prior to the constitution of the trust. They also said that these costs were to be paid by the vendor and not by the trustees.

On November 24, 1910, the taxing Master held that when the trustees' solicitors handed the deeds to the plaintiffs' solicitors without prejudice to their lien, they had a lien on them against the original trustees, the new trustee, and the debenture-holders, and he overruled the objections.

On December 8, 1910, the plaintiffs issued this summons to review. It came on for hearing before Swinfen Eady J. on February 24, 1911.

Micklem, K.C., and *Borthwick*, for the applicants. According to the provision in the prospectus these costs were payable by the vendor and the solicitors ought to have obtained payment from him. Apart from that, the trustees being mortgagees, it was their solicitors' duty to see that they obtained a proper security including delivery of the trust deed free from any lien for costs, which, if not paid by the vendor, ought to have been paid by the company as mortgagors. The trustees cannot have

intended to become personally liable. They could not give any lien for costs incurred before they became trustees. Such a lien would have defeated the objects of the deed and the performance of the trusts: *In re Sadd* (1); *In re Snell* (2); *In re Mason and Taylor* (3); *In re Llewellin* (4); *In re Lawrance*. (5) In any case, when Ayre came on the scene most of the work had been done, and he could not have given a lien for past costs. Again, the solicitors were solicitors to the original trustees personally, not to the trust estate: *Staniar* v. *Evans*. (6) If therefore the lien ever existed it was only enforceable against the original trustees, and not against their successors or their cestuis que trust or the trust estate. The limited extent to which a lien against trustees can be set up against their cestuis que trust is illustrated by *Francis* v. *Francis*. (7)

Hon. Frank Russell, K.C., and *Percy Wheeler*, for the respondents. William Wright was one of the original trustees who retained the solicitors who prepared or approved the trust deed. His executors, who hold all the debentures, dispute their liability to pay for it. It is suggested that the solicitors never had a lien on this deed as against the trustee-mortgagees. But in *In re Snell* (2) and *In re Mason and Taylor* (3), which are relied on to support this proposition, the solicitors were acting for both mortgagor and mortgagee, so that it was their duty to get their costs from the mortgagor. In *In re Mason and Taylor* (3) it was expressly held that the trustees were under no personal liability for the costs. In *In re Llewellin* (4) the mortgagee had been paid his principal, interest, and costs and had released the mortgagor. The mortgagee's solicitor had therefore no lien against the mortgagor in respect of work done during the continuance of the mortgage for which work he had given no retainer. In *In re Sadd* (1) and *In re Lawrance* (5) there was no retainer by the trustees. In the present case there was an express retainer and the solicitors obtained a lien. That lien is available against the original and subsequent trustees and cestuis

(1) (1865) 34 Beav. 650.
(2) (1877) 6 Ch. D. 105.
(3) (1878) 10 Ch. D. 729.
(4) [1891] 3 Ch. 145.
(5) [1894] 1 Ch. 556.
(6) (1886) 34 Ch. D. 470, 477.
(7) (1852) 2 D. M. & G. 73; (1854) 5 D. M. & G. 108.

C. A. 1911 — DEE ESTATES, LIMITED, *In re.* — WRIGHT *v.* DEE ESTATES, LIMITED.

que trust: *Turner* v. *Letts* (1); *In re Watson.* (2) The possibility of a trustee's solicitor obtaining a lien on documents was expressly recognized by North J. in *Staniar* v. *Evans.* (3) Quite apart from lien we also rely on clause 11 of the trust deed, which makes the costs and expenses incurred in or about the execution of the trust "or in relation to these presents" a first charge on the proceeds of sale. A similar clause was given effect to in *In re Sadd.* (4) The trust deed would prima facie have been executed after the completion of the purchase, but even if the vendor was liable for these costs, the solicitors were not in a position to enforce that liability. They could only look to their own clients.

Micklem, K.C., in reply. In *In re Sadd* (4) the first trust of the deed was to pay the costs of its preparation. In the present case clause 11 is in common form and does not apply to any costs incurred before the constitution of the trust. In *Turner* v. *Letts* (1) and *In re Watson* (2) the deceased client had a lien on the estate, and the solicitor had a lien to the same extent. In the present case the trustees themselves had no lien for costs incurred prior to the constitution of the trust, and if they had paid them they could not have recovered them from the trust estate.

SWINFEN EADY J. (after stating the facts). It is quite clear that there was an ordinary retainer by the proposed trustees and that under that retainer they became personally liable to the solicitors for costs. William Wright was one of the original trustees. He was one of the proposed trustees who joined in the retainer, and he was the sole cestui que trust. The solicitors were acting as solicitors for the trustees alone. They were not solicitors for any one else. In the prospectus of the Dee Estates Company they are referred to as solicitors for the trustees for the debenture-holders, and in that capacity only. The solicitors for the company, the mortgagors, were a different firm. So that the position is this. The solicitors were retained to do work in and

(1) (1855) 20 Beav. 185; 7 D. M. & G. 243.
(2) [1884] W. N. 38; 53 L. J. (Ch.) 305.
(3) 34 Ch. D. 470, 477.
(4) 34 Beav. 650.

about the preparation and execution of the trust deed, and in investigating the title of the property to be comprised therein and otherwise in relation thereto. Nothing turns upon the question whether the deed was actually drawn by them, or drawn by somebody else and approved by them. They acted as solicitors for the mortgagees, i.e., the trustees for the debenture-holders, and no question of quantum is raised. So that I pass by those details. The result is that, upon a retainer by William Wright jointly with one other person, the solicitors acted for the persons who ultimately became trustees; they incurred these costs in advising them on, and in relation to, and otherwise with regard to the execution of the deed; and they have never been paid their costs. In my opinion, prima facie they have a lien on that deed. At a subsequent date some other deeds, relating to the mortgage property, were handed to them by the trustees. Nothing turns upon the subsequent deeds, because the deed of trust is an essential document of title, and if they have a lien on that, it is immaterial whether or not they have a lien on the subsequent deeds. But the lien of a solicitor is a general lien, and is not confined to the deed in respect of which the costs arise. Prima facie, therefore, the solicitors had a lien for their costs against the persons who employed them; and the trustees could not have obtained that deed from the solicitors without paying their costs. I can see no ground upon which the cestuis que trust could obtain that deed without paying the solicitors' costs, and none the less because it so happens that the sole cestui que trust was also one of the trustees.

It was contended that the solicitors ought not to have a lien as it was their duty to see that the costs were paid by somebody else, and not by the trustees. How were the solicitors to fulfil such a duty as that? They were retained simply by the proposed trustees, and they had no other client. The statement in the prospectus that the vendor would pay all expenses of every kind up to and including the completion of the purchase was relied on, but it does not appear that the costs of the mortgage were incurred before the completion of the purchase. Apart from that, even if these costs were payable by the vendor according to the terms of the prospectus, how could

C. A. 1911

DEE ESTATES, LIMITED, *In re.*

WRIGHT *v.* DEE ESTATES, LIMITED.

Swinfen Eady J.

the trustees' solicitors make him pay? They had no contract or retainer from him, and they could not sue him for those costs. I fail to see any way in which they could have compelled anybody else to pay the costs. It is not like the case of solicitors acting for mortgagor and mortgagee, where possibly their costs may be taken out of money passing through their hands. It was said that it was the solicitors' duty to see that somebody else paid the costs. I fail to see how any such duty arose or could have been carried out. The solicitors were helpless and they could only look to their clients for their costs.

Various authorities have been cited, but no case has been referred to where a solicitor has incurred costs on the retainer of one party only in which it has been held that the client could obtain the deeds without paying the bill. In *In re Snell* (1) the solicitor was acting for the mortgagee and the mortgagor, and the judgment was that a solicitor acting for the mortgagee as well as the mortgagor in the preparation of a mortgage loses his lien on the title deeds in his possession for costs due to him from the mortgagor. That is a very different matter.

In *In re Mason and Taylor* (2) Hall V.-C. upon the facts came to the conclusion that there were no costs for which the trustees were under any personal liability. He says: "It appears to me that it is a just conclusion from all the facts in this case, that the trustees were acting through and employing the solicitors of the company, but in this sense, that they did not undertake, nor expect to undertake, any personal liability in respect of payment for the preparation of the deed." That was a case in which the company were to convey property to certain trustees, and two of the directors were appointed trustees and the solicitors of the company acted. The Vice-Chancellor came to the conclusion that there was no personal liability of the trustees to pay. The opposite is the case in the present instance.

In *In re Llewellin* (3) the mortgagee had been paid principal, interest, and costs, and the decision was that the mortgagee's solicitor had no lien on the deeds as against the mortgagor even for work done during the continuance of the mortgage.

(1) 6 Ch. D. 105. (2) 10 Ch. D. 729, 732.
(3) [1891] 3 Ch. 145.

In *In re Lawrance* (1) it was merely decided that a solicitor preparing a marriage settlement on the instructions of the husband, who gave the retainer, had no lien upon it as against the trustees. If the trustees had been personally liable for any costs there, I think they would have been provided for, because, after determining that there was no lien, Kekewich J. says: "It has been suggested that the trustees of the settlement might on the question asked for that purpose in the summons, pay these costs out of the trust fund. It is quite impossible for me to accede to that. If there were a lien, probably I might, on a proper application, assent to the trustees paying these costs in order to discharge the lien."

It is also clear that if there is a lien on the part of a solicitor as against the trustees, the cestui que trust cannot obtain the deeds without providing for the lien; the cestui que trust has no higher title than the trustees, and a succeeding trustee is in no better position as regards the lien than a former trustee. In *Turner* v. *Letts* (2) it was decided by the Lords Justices that an administratrix de bonis non could not take deeds away from the solicitor of a deceased executrix without providing for a lien for costs incurred by the executrix, in respect of which her estate was prima facie entitled to be indemnified. It was further held that, if there had been no question as to the solicitor's lien, the residuary legatees could not have taken the deeds out of the hands of the executrix except on the terms of paying what was due. In my opinion, therefore, the trustees and the cestui que trust can only take subject to the solicitors' lien.

But whether the solicitors had a lien or not, I am of opinion that the present costs are covered by clause 11 of the trust deed. What were the costs that had been incurred? They were certainly costs incurred in or about the preparation and execution of the deed of trust or otherwise in relation to that deed. Now the first trust is that out of the proceeds of sale the trustees are to "pay or retain the costs and expenses incurred in or about the execution of such trust or otherwise in relation to these presents." The costs in question were incurred "in relation to these presents," i.e., in the preparation and execution of the deed; and

(1) [1894] 1 Ch. 556, 560. (2) 20 Beav. 185; 7 D. M. & G. 243.

C. A. 1911

DEE ESTATES, LIMITED, *In re.* WRIGHT *v.* DEE ESTATES, LIMITED.

Swinfen Eady J.

on the second point I determine that they are within those actual words, and that clause 11 is not limited to costs incurred after the deed has been executed and acted upon. The summons to vary fails.

I do not think I am called upon to express any opinion with regard to the merits, further than this. Each side has said that there was a case of hardship; but I cannot fail to observe that the summons is really taken out by the executors of the cestui que trust taking the whole property, and that they are seeking to claim the benefit of the trust deed and the property comprised in it without paying any part of the costs of the persons who prepared it. I dismiss the summons with costs.

G. R. A.

C. A.

The applicants appealed. The appeal was heard on April 6, 1911.

Micklem, K.C., and *Borthwick*, for the appellants, used the same arguments as in the Court below.

Hon. Frank Russell, K.C., and *Percy Wheeler*, for the respondents, were not called upon to argue.

COZENS-HARDY M.R. This appears to me a hopeless appeal. What are the facts? A company was minded to borrow on debentures to be secured by a trust deed and trustees were proposed. Separate solicitors were acting for the debenture-holders' trustees and for the company. One of the trustees withdrew before the trust deed was executed, but nothing turns upon that. The trustees retained Priestman as their solicitor. In what character did they retain him? Plainly in the character of trustees of this deed. Priestman on their instructions investigated the title and prepared the mortgage deed, and in respect of that business he was entitled by way of remuneration to the scale fee in addition to certain small out of pocket costs. Whom could he sue for that? No other human being than the trustees. It was said that as between the company and the debenture-holders the company was liable. So be it. But that was not a right which Priestman could enforce. His only right was against the trustees who employed him. Priestman has handed

over the deeds in his possession for the purposes of this action, but without prejudice to his lien for costs. It is said that Priestman has no lien. I ask myself why? It seems to me a simple and plain case of lien. It is the ordinary lien which a solicitor has for costs on his retainer by a client to prepare a particular deed. Can it make any difference that at the time when these costs were incurred the persons who employed Priestman were only in contemplation of becoming trustees for the debenture-holders, who thereafter might take an interest under the deed? I cannot follow that. It is plain that cestuis que trust cannot take any benefit except on the terms of indemnifying their trustee against all liability actually incurred by him. What possible difference can it make that in this case the cestuis que trust occupy the position of debenture-holders? In my opinion this is a plain case. If the solicitor had also been acting as solicitor for the company, so that there were two different persons liable to him for costs, different considerations might possibly have arisen. Certainly if I follow the view taken by Hall V.-C. in *In re Mason and Taylor* (1) no lien could be exercised by the solicitor against the trustees if it was part of the original bargain that the solicitor should look for payment to the company alone. That being so, the Vice-Chancellor held that the solicitors in that case had no lien on the trust deed against the trustees. That decision has no bearing whatever on a case where separate solicitors are employed by the company and the trustees, and where the solicitor has one right, and one right only, against the clients who employed him, even though as between the company and the debenture-holders the company was bound to pay these costs. On this ground I think that the decision of the learned judge is right, but I also think, though it is not necessary to decide the point, that his decision can be supported under the express language of clause 11 of the trust deed. The appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion.

BUCKLEY L.J. It is contended that the solicitor has no lien for these costs because they were costs incurred before the

(1) 10 Ch. D. 729.

C. A.
1911
DEE ESTATES, LIMITED, *In re.*
WRIGHT *v.* DEE ESTATES, LIMITED.
Buckley L.J.

creation of the trust and because they are costs which as between the company and the debenture-holders the company ought to pay. The latter consideration is irrelevant. Whether the company ought to bear them to the indemnity of the debenture-holders is not the question which we have to decide. The question here is how these costs ought to be borne as between the trustee on the one hand and the debenture-holders, the cestuis que trust, on the other. The contention of the debenture-holders amounts to this, that the trustee must pay these costs out of his own pocket. To my mind that is an impossible contention. As between Wright, the debenture-holders' trustee, and Priestman, the solicitor, there is no question but that the solicitor has a lien against Wright for these costs. The debenture-holders in effect come to the Court and say to the trustee or his successors in the trust "Hand us over these deeds without providing for the lien which your solicitor confessedly has against Wright." The obvious answer to that contention is that as between the debenture-holders and the trustee the debenture-holders have no right to the deeds until they have indemnified the trustee against all costs, charges, and expenses properly incurred. In my opinion that applies to costs, charges, and expenses properly incurred by the trustee before the actual creation of the trust and before the execution of the trust deed as well as afterwards. The contention that a trustee is not entitled to be indemnified against costs properly incurred by him before the execution of the trust deed is one which does not commend itself to my judgment. As between cestui que trust and trustee the trustee is entitled to be indemnified by the cestui que trust against all costs, charges, and expenses which he has properly incurred in relation to the trust.

Solicitors: *Ridsdale & Son, for Freeth, Rawson & Cartwright, Nottingham; Steavenson & Couldwell, for T. & A. Priestman, Hull.*

H. B. H.

LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* HOWLEY PARK COAL AND CANNEL COMPANY.

C. A. 1911

March 21, 22, 23; *April* 8.

[1908 L. 1671.]

Railway—Minerals—Support—Mines lying beyond the Forty Yards Limit—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77, 78, 79.

The mining sections (ss. 77 to 85) of the Railways Clauses Consolidation Act, 1845, do not apply to mines lying outside the forty yards or other prescribed limit under s. 78; consequently a railway company enjoys the common law right of lateral support for its railway from mines lying outside the prescribed limit.

Great Western Ry. Co. v. *Bennett* (1867) L. R. 2 H. L. 27, discussed.

A railway company by purchasing a stratum of coal or other minerals underlying its railway in lieu of paying compensation under s. 78 does not acquire any additional right of support from subjacent or adjacent mines lying within the prescribed limit.

The mining sections of the Railways Clauses Consolidation Act, 1845, are not confined to lands acquired by a railway company under its compulsory powers, but extend to lands acquired by voluntary purchase after the expiration of its compulsory powers.

Appeal from a decision of Eve J.

The plaintiffs, the London and North Western Railway Company, were the owners in fee simple of a tunnel forming part of their Leeds, Dewsbury, and Manchester Railway and known as the Morley tunnel, and they were also the owners in fee simple of two seams of coal called "the Stone Coal" and "the Cromwell Bed" which lay under the tunnel. The defendants, the Howley Park Coal and Cannel Company, were the lessees of a seam of coal called "the Top Beeston Bed" which lay under the Stone Coal and the Cromwell Bed. The plaintiffs claimed (1.) an injunction to restrain the defendants from working the Top Beeston Bed in such a manner as to withdraw vertical or lateral support from the tunnel; (2.) alternatively an injunction to restrain the defendants from working the Top Beeston Bed in such a manner as to withdraw lateral support from the tunnel outside the distance of forty yards therefrom; (3.) an injunction to restrain the defendants from working the Top Beeston Bed in such a manner as to withdraw vertical or

C. A. 1911

LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY.

lateral support from the Stone Coal and the Cromwell Bed or either of them.

The material facts were as follows:—The tunnel was constructed by the plaintiffs' predecessors, the Leeds, Dewsbury, and Manchester Railway Company, under a special Act passed on June 30, 1845 (8 & 9 Vict. c. xxxvi.), which incorporated the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845. It was opened for traffic in August, 1848, and its construction was commenced while the company's compulsory powers were still in force. By a deed of appointment and conveyance dated July 10, 1852, and made between the Earl of Cardigan of the one part and the plaintiffs of the other part, the Earl, in consideration of the sum of 1800*l.*, appointed that certain pieces and parcels of land therein described, containing 5 acres 1 rood 26 poles, and distinguished by the numbers on the parliamentary plan therein mentioned, and also all that the right and privilege of making and for ever after maintaining and using a tunnel of such dimensions and with such shafts and other conveniences as the company should from time to time think fit in, upon, through and under all those several other pieces or parcels of lands wherein part of the Morley tunnel was then made, containing 3 acres 0 roods 10 perches, should thenceforth go, remain, and be to the use of the railway company, their successors and assigns, for ever.

By two leases dated March 25, 1852, and March 11, 1875, the Earl of Cardigan and those claiming under him leased to the predecessors of the defendants for successive terms expiring on January 1, 1900, (inter alia) two beds or seams of coal, known as "the Stone Coal" and "the Cromwell Bed" respectively, underlying an area of land which included the site of the tunnel and the land adjacent thereto on each side, with the usual powers of mining and getting the demised minerals. Each lease contained a reservation to the lessors of all mines and minerals, other than the demised seams, underlying the area whether above, between, or below the demised seams, and in each lease a provision was inserted to the effect that if the plaintiffs for the safety of their line of railway or works or for any other purpose or object should purchase all or any of the demised seams lying within or

under the lands over which the railway or works passed or were situate the lessees were on the dates and in manner therein mentioned to pay the lessors for such coal the acreage rent thereby reserved. In June, 1868, the lessees of the Stone and Cromwell seams served upon the plaintiffs a notice under the Railways Clauses Consolidation Act of their intention to work these seams under a part of the railway, and in the following month the plaintiffs served a counter-notice of their willingness to treat for the coal so intended to be worked. Nothing came of these notices at the time, but other notices followed on May 2, 1872, and June 1, 1875, defining the area of coal in each seam which the plaintiffs required to be left ungotten, and after some correspondence the plaintiffs on February 10, 1876, offered in terms to pay to the lessees as compensation for their interest in the coal so to be left ungotten the sum of 8620*l.*, and to the lessors for their royalties or rents in respect thereof the sum of 3160*l.* This offer was not accepted, but other figures were agreed, and ultimately, by an indenture dated April 18, 1878, which recited the lease of March 11, 1875, and that the lessees had given to the plaintiffs notice of their intention to work and get certain of the mines and minerals comprised therein lying under, adjoining, and near their railway, and that the plaintiffs had required the same to be left unworked and ungotten and had accordingly contracted with the lessees for the purchase thereof at the price of 13,842*l.* 14*s.* 6*d.*, the lessees in consideration of that sum assured to the plaintiff company according to the true intent and meaning of the special Acts of the company or one or more of them in that behalf and the Lands Clauses Consolidation Act and the Railways Clauses Consolidation Act incorporated therewith respectively all their leasehold interest in so much of the said two seams of coal as lay within and under the respective areas of land therein more particularly mentioned. By another indenture dated November 29, 1878, the persons entitled to the demised seams in reversion expectant on the determination of the lease, in consideration of 157*l.* 5*s.* 6*d.*, conveyed to the plaintiffs their freehold reversion in the coal to be left ungotten under the respective areas defined by the deed of April 18, 1878.

By leases dated January 9, 1901, and December 4, 1903, the

C. A. 1911

LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY.

successors of the Earl of Cardigan demised to the defendants (inter alia) another seam of coal known as "the Top Beeston Bed" underlying the tunnel and adjacent lands at a depth of 772 feet below the surface. The defendants gave notice under the Railways Clauses Consolidation Act of their intention to work this seam in the vicinity of the tunnel, and they claimed the right to work this seam in manner provided by the Act. It was proved that this seam could not be worked without affecting the surface and thereby causing serious risk to the railway and works within an area the limits of which extended on each side of the railway some yards beyond the distance of forty yards prescribed by the Act.

Eve J. dismissed the action. He said that the question to be determined was the extent (if any) to which the plaintiffs were entitled without making any further payment to the defendants to have the Morley tunnel supported by subjacent and adjacent minerals of which the defendants were the lessees. He proposed to deal first with the claims to the first and third injunctions because although they depended upon different considerations they both involved an inquiry into the facts of this particular case and to some extent fell to be determined upon those facts. The claim to the second injunction raised a point of general and far-reaching importance for the determination of which the facts were relevant only so far as they were common to this particular case and to every other case where the minerals under the adjacent land were in the same ownership as the minerals under the land purchased by the railway company and within the prescribed distance therefrom. Dealing with the first claim, he said with reference to the deed of July 10, 1852, that the plaintiffs' contention that a railway company had no power under the Railways Clauses Consolidation Act to acquire compulsorily the right to make and use the tunnel, as distinguished from the right to acquire land for that purpose, was disposed of by *London and North Western Ry. Co.* v. *Ackroyd* (1), a case which related to the same tunnel. In his opinion the purchase was a compulsory one in that it was made and possession thereunder given while the compulsory powers of

(1) (1862) 31 L. J. (Ch.) 588.

the company were in force: *Hooper* v. *Bourne* (1); but he was further of opinion that the question whether the purchase was voluntary or compulsory was immaterial, there being nothing to restrict the application of the mining sections of the Railways Clauses Consolidation Act to land which was acquired compulsorily. Therefore the plaintiffs' claim to the first injunction failed.

Dealing next with the claim to the third injunction, he referred to the leases to the defendants' predecessors of the Stone Coal and the Cromwell Bed respectively, and to the negotiations which culminated in 1878 in the purchase by the plaintiffs of the leasehold interest in so much of the two seams of coal as lay under the respective areas of land defined in the purchase deed and the purchase of the freehold reversion in the coal to be left ungotten under those defined areas, and observed that in this manner compensation was made to all persons interested in the ungotten minerals either under s. 6 or s. 78 of the Railways Clauses Consolidation Act in accordance with the decision in *Smith* v. *Great Western Ry. Co.* (2) In his Lordship's opinion the contention of the plaintiffs that this transaction was not in substance a payment by them of compensation under ss. 6 and 78 of the Railways Clauses Consolidation Act, but was a sale and purchase carried out by a conveyance which placed the conveying parties in a wholly different position from that which they would have occupied had the matter been concluded by the simple payment of compensation in exchange for a receipt, and that the conveyance imposed an obligation on the conveying parties not to withdraw from the minerals thereby conveyed the support they enjoyed at that date from subjacent and adjacent minerals belonging to the conveying parties, could not prevail. At the date of the assignment in 1878 the lessees had no interest in the minerals which it was contended must now be left to support the coal then left ungotten, and even if he were to treat the plaintiffs as purchasing from the reversioners their interest in the ungotten minerals and not as compensating them therefor, the purchase was in truth a purchase of land within s. 77, and did not therefore include any underlying minerals.

(1) (1880) 5 App. Cas. 1. (2) (1877) 3 App. Cas. 165.

C. A. 1911 — LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY.

In his opinion, therefore, it was of no importance whether the transaction of 1878 was a payment of compensation evidenced by a conveyance or whether it was in fact a sale and purchase. In either case it carried no right of support from the underlying minerals and could not be successfully set up as a ground for claiming the relief asked by the third injunction. That claim therefore failed.

Dealing with the claim to the second injunction, namely, the injunction to restrain the withdrawal of support by working minerals outside the prescribed distance, his Lordship said that the arguments of the plaintiffs rested upon the proposition that the operation of the mining code was limited under ss. 77 and 78 to the minerals lying under the railway and within the prescribed distance, that outside these limits the respective rights of landowner and company were unaffected by the statute, and accordingly that the company enjoyed the right to have the surface of the land purchased by them supported by the adjacent minerals of the vendor, and *Manchester Corporation* v. *New Moss Colliery, Ld.* (1) was cited in support of that proposition. If that were the only authority dealing with the respective rights of landowner and undertakers in relation to support from minerals outside the prescribed area he would have felt himself bound to hold that such rights must be ascertained by the application of the common law and not by reference to the statutory code, notwithstanding that the case in which the dicta leading to that result were to be found was a case to which it was held that the statutory code had no application and the cases decided thereunder no relevancy; but in truth the very point seemed to him to be concluded by a decision of the House of Lords in a case arising under the Railways Clauses Consolidation Act. In *Great Western Ry. Co.* v. *Bennett* (2) the House of Lords was called upon to determine the proper basis upon which the compensation claimed by the mine owner, Bennett, ought to be assessed. His claim fell under two heads. Under the first he claimed compensation in respect of mines for which the railway company had served him with notice of their willingness to treat; these mines lay under the land coloured pink in the plan referred to in the

(1) [1906] 2 Ch. 564; [1908] A. C. 117. (2) L. R. 2 H. L. 27.

report. Under his second head of claim he claimed compensation for other mines and minerals lying under other land—coloured blue on the plan—which he could by severance be prevented from working. It appeared from the case and appendix—though not from the report of the case in the *Law Reports*—that the blue land included land outside the statutory prescribed limit. In respect of the minerals under the blue land the arbitrator had made an alternative award by which he determined that if Bennett would have been entitled to work out the whole of the mines and minerals thereunder the amount payable to him by way of compensation was 1042*l.* 7*s.* 2*d.*, but that if he was bound to leave reasonable support then the amount of compensation was 140*l.* 16*s.* 7*d.* It did not appear from the report that any attempt was made in the arguments to distinguish between Bennett's right to work minerals inside and outside the prescribed area, but in holding that he was entitled to the larger sum in respect of the minerals under the blue land the House did, as it seemed to him, decide in terms that the railway company could not rely on the principles of the earlier decisions in *Caledonian Ry. Co.* v. *Sprot* (1) and *Elliot* v. *North Eastern Ry. Co.* (2) and were not entitled to support from any of such minerals. In substance the decision was that the mine owner was entitled to work out the whole of the minerals under the blue land, that being the assumption on which alone the larger sum had been awarded to him. He did not think that he could respectfully assume that in arriving at that conclusion the Lord Chancellor and the other learned Lords failed to appreciate that the blue land lay in part outside what had been appropriately called the statutory belt. He thought he was bound to have regard to all that the decision involved, and to hold that in the circumstances of this case, as in *Bennett's Case* (3), the railway company enjoyed no common law right of support from minerals vested in the defendants lying beyond the prescribed distance, and accordingly were not entitled to an injunction restraining the defendants from working the same. The action therefore failed on each point.

(1) (1856) 2 Macq. 449. (2) (1863) 10 H. L. C. 333.
(3) L. R. 2 H. L. 27.

C. A. 1911

LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY.

The plaintiffs appealed from this judgment, but as regards the decision upon the claim to the first injunction the appeal was not opened. The appeal came on for hearing on March 21, 1911.

Sir Robert Finlay, K.C., *Ernest Page, K.C.*, *MacSwinney*, and *J. A. Tweedale*, for the appellants. 1. The code contained in ss. 77 to 85 of the Railways Clauses Consolidation Act, 1845, has no application beyond the forty yards limit or other distance prescribed by s. 78, and therefore the plaintiffs are entitled to an injunction to restrain the defendants from working their Beeston bed outside that limit in such a way as to withdraw support from the plaintiffs' tunnel. Within the forty yards limit a railway company cannot claim the right of an ordinary purchaser of the surface to subjacent and adjacent support in so far as the respective rights of the railway company and the mine owner are regulated by the special provisions of the code. But beyond the prescribed limit, where no special rights are given to the railway company in substitution for the common law right of support, the parties are left to their common law rights. That was the view expressed by Cozens-Hardy M.R. in respect of the corresponding sections of the Waterworks Clauses Act, 1847, in *Manchester Corporation* v. *New Moss Colliery, Ld.* (1), and in the House of Lords, where the decision of the Court of Appeal was unanimously affirmed (2), three of the learned Lords expressly concurred in that view. Eve J. did not dissent from that doctrine, but he considered himself precluded from giving effect to it by the decision of the House of Lords in *Great Western Ry. Co.* v. *Bennett* (3) because, upon a minute examination of the plans in that case, it appeared that a small portion of the land there in question was outside the forty yards limit. The learned judge was wrong in considering himself fettered by that decision, for, first, the point was not brought to the attention of the House, secondly, *Bennett's Case* (3) was treated as an appeal from *Fletcher* v. *Great Western Ry. Co.* (4), which related solely to minerals within the prescribed

(1) [1906] 2 Ch. 564.
(2) [1908] A. C. 117.
(3) L. R. 2 H. L. 27.
(4) (1859) 4 H. & N. 242; (1860) 5 H. & N. 689.

distance, and, thirdly, the reasoning of the learned Lords is wholly inconsistent with the idea that they were deciding that as to land beyond the statutory limit, where no special rights were given to the railway company, the mine owner was entitled to work his minerals so as to withdraw support from the railway. That case, therefore, has no application. It is true that some of the dicta of Lord Westbury in that case upon the construction of these sections of the Act went too far, and they have since been disapproved in *Dixon* v. *Caledonian and Glasgow and South Western Ry. Cos.* (1) and *Ruabon Brick and Terra Cotta Co.* v. *Great Western Ry. Co.* (2), but upon the point at issue here he was in complete harmony with the other members of the House. The two last-named cases shew that it is not correct to say that under the Act the railway company get no right of adjacent and subjacent support; they do get a right of support except so far as the mine owner at any particular moment requires to utilize his mines, and the amount of restriction on the company's right of support is measured by the provisions of the Act which deal with the notice of the mine owner of his intention to work and the counter-notice of the company of their willingness to pay compensation. But all that relates to minerals within the forty yards limit. This question is really governed by *Manchester Corporation* v. *New Moss Colliery, Ld.* (3), which shews that the right of the owner to give a notice and the right of the company to give a counter-notice do not extend beyond the forty yards limit, and that beyond that distance the right of support is the common law right. That view is also supported by the observations of Lord Pearson in *North British Ry. Co.* v. *Turners, Ld.* (4) and of Lord Macnaghten in *Midland Ry. Co.* v. *Robinson.* (5) It is true that Lord Macnaghten there dissented from the view of the majority, but upon a different question altogether, namely, what were minerals under the Act. See also *Elliot* v. *North Eastern Ry. Co.* (6), approved by Lord Halsbury in *London and North Western Ry. Co.* v. *Walker* (7), and *Haines*

(1) (1880) 5 App. Cas. 820.
(2) [1893] 1 Ch. 427.
(3) [1906] 2 Ch. 564; [1908] A. C. 117.
(4) (1904) 6 F. 900, 906.
(5) (1889) 15 App. Cas. 19, 35.
(6) 10 H. L. C. 333.
(7) [1903] A. C. 289, 293.

C. A. 1911

LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY.

v. *Roberts* (1), approved by Lord Davey in *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (2)

It may be objected that with regard to the minerals outside the forty yards limit the owner would get no compensation for being forced to leave them to support the railway, but the answer to that objection is that that would have formed a legitimate element in the compensation to be paid when the land was taken: *London and North Western Ry. Co.* v. *Evans* (3); *Clippens Oil Co.* v. *Edinburgh and District Water Trustees* (4); and the fact that the owner may not have been alive to the importance of the question at the time when the compensation was assessed cannot alter the law on the subject.

2. The plaintiffs are entitled to an injunction to restrain the defendants from working the Top Beeston Bed in such a way as to withdraw support from the Stone Coal and the Cromwell Bed. The plaintiffs, instead of paying compensation to the owners under the Act for leaving these two seams of coal unworked, elected to purchase the interest of the lessees and of the reversioners in those two seams. That was an entirely different transaction: *Duke of Hamilton's Trustees* v. *Caledonian Ry. Co.* (5); *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* v. *Pontypridd Waterworks Co.* (6); *Smith* v. *Great Western Ry. Co.* (7); *Sanderson* v. *Cockermouth and Workington Ry. Co.* (8) It was a simple common law conveyance of these two seams, and it imposed an obligation on the conveying parties not to withdraw from the minerals thereby conveyed the support which they enjoyed at that date from subjacent and adjacent minerals belonging to the conveying parties. The compulsory powers of the plaintiffs had long since expired, and this conveyance carried with it all the incidents of a common law conveyance.

Sir Alfred Cripps, K.C., P. O. Lawrence, K.C., John Dixon, and *Ashworth James,* for the respondents. As to the first point, dealing with it as a question of principle, the proper construction of the mines and minerals clauses taken as a whole is that

(1) (1857) 7 E. & B. 625.
(2) [1906] A. C. 305, 315.
(3) [1893] 1 Ch. 16.
(4) [1904] A. C. 64.
(5) (1905) 7 F. 847.
(6) [1903] A. C. 426.
(7) 3 App. Cas. 165.
(8) (1850) 2 H. & Tw. 327.

in the case of a sale of lands to a railway company to which this special code applies the common law implication ceases to apply altogether, and it is inconsistent with this principle to draw any distinction between mines lying within the forty yards limit and beyond. That limit was fixed in 1845, when deep mining was unknown and it was thought that that was a sufficient margin of safety. The only difference is that within the forty yards limit the railway company or the water company or the corporation as the case may be have certain rights which outside that limit they have not got. Beyond the limit the mine owner may work his mines as he likes. This view is supported by the authorities. In *Bennett's Case* (1) Lord Cranworth said that the object of the statute was to get rid of all the ordinary law on the subject. No distinction was there drawn between land within and land outside the prescribed limit, and it was a decision of general application. The same view of the statute was adopted by Lord Herschell in *Midland Ry. Co.* v. *Robinson* (2), by Lord Esher and Rigby L.J. in *In re Lord Gerard and London and North Western Ry. Co.* (3), by A. L. Smith J. in *Consett Waterworks Co.* v. *Ritson* (4), by Lindley L.J. in *Ruabon Brick and Terra Cotta Co.* v. *Great Western Ry. Co.* (5), by Lord Esher in *Pountney* v. *Clayton* (6), by Lord Herschell in *Holliday* v. *Wakefield Corporation* (7), and by Parker J. in *Jary* v. *Barnsley Corporation* (8), and it is also supported by *Midland Ry. Co.* v. *Miles.* (9) Against those dicta may be set the doubt expressed by Bowen L.J. in *Pountney* v. *Clayton* (10) whether *Bennett's Case* (1) extends to land beyond the forty yards limit, but that was at most a doubt, and upon a fair reading of his judgment as a whole he must be taken to have accepted the view of the law presented by the Master of the Rolls (Lord Esher) in that case. The consequences of the decision in this case may be very serious both to the railway company and the mine owner, but the question must be determined by the true relationship

(1) L. R. 2 H. L. 27, 40.
(2) 15 App. Cas. 19, 27.
(3) [1895] 1 Q. B. 459, 464, 469.
(4) (1889) 22 Q. B. D. 318, 326.
(5) [1893] 1 Ch. 427, 452.
(6) (1883) 11 Q. B. D. 820, 836.
(7) [1891] A. C. 81, 102.
(8) [1907] 2 Ch. 600, 615.
(9) (1885) 30 Ch. D. 635; (1886) 33 Ch. D. 632.
(10) 11 Q. B. D. 820, 842.

C. A. 1911

LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY.

between the parties, and if the margin of safety was not drawn sufficiently wide the promoters ought to have seen to it and the principle of caveat emptor applies: per Lord Macnaghten in *Lord Provost and Magistrates of Glasgow* v. *Farie*. (1) This question is not determined by *Manchester Corporation* v. *New Moss Colliery, Ld.* (2), which was decided under the Waterworks Clauses Act, 1847, because the decision there was that, whether the land was within or without the prescribed limit, the case did not fall within the Act. *Elliot* v. *North Eastern Ry. Co.* (3), which was dealt with in *Bennett's Case* (4), was also a decision under a different Act and has no application.

As to the second point, the purchase by the company of these two strata, especially having regard to the terms of the conveyance, is subject to the provisions of ss. 78 and 79 of the Act and does not carry with it the common law right of support from the subjacent minerals inasmuch as those provisions are inconsistent with the existence of that common law right. The conveyance was the result of a series of negotiations following upon a notice by the mine owners of their intention to work, and the mines were purchased by the railway company as a substitute for paying compensation. In construing the words of a conveyance it is permissible to look at the circumstances under which it was made and the object, appearing from those circumstances, which the parties had in view: *Butterley Co.* v. *New Hucknall Colliery Co.* (5)

Ernest Page, K.C., in reply.

Cur. adv. vult.

April 8. COZENS-HARDY M.R. This appeal raises the important question whether a railway company is entitled to lateral support from minerals outside the prescribed limit of forty yards. It is necessary to consider carefully what has been spoken of as "the code," that is to say, ss. 77 to 85 of the Railways Clauses Consolidation Act, 1845. There has been a great deal of litigation in the last sixty years as to the meaning of the code, but

(1) (1888) 13 App. Cas. 657, 698.
(2) [1906] 2 Ch. 564; [1908] A. C. 117.
(3) 10 H. L. C. 333.
(4) L. R. 2 H. L. 27.
(5) [1910] A. C. 381.

without exception the litigation has related only to minerals within the prescribed limit of forty yards. In saying this I do not forget that in the very important case of *Great Western Ry. Co.* v. *Bennett* (1) it appears from an examination of the plan annexed to the papers, with the aid of a scale and a pair of compasses, that some small part of the coal area was outside the limit. But this fact was not mentioned by either the appellants or the respondents in their printed cases or by counsel in argument, or by the Lords who took part in the hearing; and I think it is improper to treat that case as in any way deciding a most important point which was neither raised nor argued, nor, so far as I can see, present to the mind of any one of the noble Lords. In truth, *Bennett's Case* (1) was treated as in effect an appeal from the judgment of the Exchequer Chamber in *Fletcher's Case* (2), which dealt only with minerals within the forty yards. The point is, therefore, not covered by authority. Sect. 77 is a mere rule of construction. In a conveyance which is so worded that minerals, though not mentioned, would pass to an ordinary purchaser, the minerals are, if a railway company is the purchaser, to be deemed to be excepted out of the conveyance unless they are expressly named therein and conveyed thereby. For the present purpose no difficulty arises under s. 77. Sect. 78 is a general section, applying not only to minerals lying under the railway, but also to minerals within the forty yards. It applies without regard to the title under which the minerals or the surface (by which I mean the land usque ad inferos except minerals) may be claimed. It compels the mineral owner who is desirous of working within the forty yards to give thirty days' notice. The company may then give a counter-notice of their willingness to pay compensation for the minerals, and if so the mineral owner is not to work them. By s. 79, if the company do not give a counter-notice, the owner may work the minerals even though the surface is let down, the only restriction being that he must work according to the usual manner of working in the district. It was held by the House of Lords in *Bennett's Case* (1), which has since been repeatedly followed, that the rights given by s. 78 to the railway company are in substitution

(1) L. R. 2 H. L. 27. (2) 5 H. & N. 689.

C. A. 1911 — LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY. — Cozens-Hardy M.R.

for the common law right of support, whether vertical or lateral, within the forty yards limit. It is only within that limit that the railway company can claim the right to pay compensation, without actually purchasing the minerals. Beyond the forty yards the owner can work without giving thirty days' notice, and indeed he cannot give any statutory notice, and of course no counter-notice can be given by the railway company. Compensation payable under s. 78 is only for minerals within the forty yards. On principle, it seems to me that the common law right of lateral support is only taken away to the extent to which the notice and the counter-notice can relate. The common law right of support by soil not being mineral is not taken away even within the forty yards, and I think the common law right of lateral support outside the forty yards remains whether the soil is or is not mineral. Our attention has been called to many authorities in which wide language was used to the effect that all common law right to mineral support is taken away by the code. But that language was, without exception, used where only the forty yards limit was in question, and it ought to be taken as addressed to that state of facts only, and not to be treated as a judicial decision upon a point which did not arise for decision. In the argument for the railway company much stress was laid upon the decision of this Court and of the House of Lords in *Manchester Corporation* v. *New Moss Colliery, Ld.* (1), but on consideration I do not think it is decisive in favour of the appellants, although it assists their contention. It turned upon the Waterworks Clauses Act, 1847, which differs in some respects from the Railways Clauses Consolidation Act, 1845. Sect. 23, which corresponds to s. 79, provides that if a counter-notice is not given within thirty days the mineral owner may work "as if this Act and the special Act had not been passed." All the judges in this Court and all the Law Lords laid great stress upon those words. The result was that the parties were then remitted to their common law rights; and the Manchester Corporation, as purchasers of Taylor's land, partly within and partly without the forty yards, possessed all such common law rights of vertical and lateral support as their vendor had. The result is that in

(1) [1906] 2 Ch. 564; [1908] A. C. 117.

my opinion the appellants are entitled to an injunction to restrain the respondents from working minerals outside the forty yards limit in such a manner as to withdraw lateral support from the Morley tunnel. Eve J. thought himself bound by *Bennett's Case* (1) to take an opposite view, though I infer that his own opinion agreed with that which I have above expressed.

There is a second and quite distinct point upon which Eve J. has given a decision against the railway company. The company in 1878 purchased one of the upper seams called the Stone Coal, and they are owners in fee of this particular stratum. They contend that in respect of this stratum they are entitled to a common law right of support within the forty yards limit without paying compensation, and in that character they claim an injunction to prevent the withdrawal of support by the subjacent seams within the forty yards limit. In my opinion this claim cannot prevail. Sect. 77 has no application, for there can be no implied exception of the subjacent minerals from this grant, for the grant itself was limited to the particular stratum or seam. They purchased no right to the subjacent minerals. They are in no better position than if they had originally purchased the surface together with this particular stratum or seam of coal but without any other minerals, but although s. 77 does not apply, on the other hand s. 78 is perfectly general, and entitles the owner of the lower seam to work within the forty yards on giving thirty days' notice unless the railway company gives a counter-notice and pays compensation. I think Eve J.'s decision on this point was correct, and that no injunction ought to be granted except that which I have indicated in the earlier part of my judgment, namely, an injunction limited to workings outside the forty yards limit.

As to costs, I think, of course, the railway company must have the costs of the appeal, and they must have the general costs of the action except such extra costs, if any, as were occasioned by the special claim with reference to the tunnel—a claim which was not opened by Sir Robert Finlay. The precise wording of the order we will hereafter deal with.

(1) L. R. 2 H. L. 27.

C. A. 1911

LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY.

FLETCHER MOULTON L.J. The claims put forward by the plaintiffs, the London and North Western Railway Company, in this appeal raise the whole question of the interpretation of the fasciculus of clauses in the Railways Clauses Consolidation Act, 1845, which relate to "mines lying under or near the railway." These clauses are not easy to understand, and have formed the subject of many decisions, some of which are difficult to reconcile, and I have come to the conclusion that the safest and best way to arrive at the principles which ought to guide our decision in this case is, first, to examine closely the language of these clauses with a view to ascertaining their true construction directly, and then, so far as is necessary, to compare the result so arrived at with the decisions relating to the question. As is so often the case, there is danger of the numerous commentaries overshadowing the text, and the dicta of eminent judges taking the place of the language of the statute.

Leaving the heading of the fasciculus for consideration later on, one must first take clause 77, which provides that the company shall not be entitled to mines under any land purchased by them unless they have been expressly purchased, and that such mines shall be deemed to be excepted out of the conveyance of such lands unless they have been expressly named therein and conveyed thereby. This is, in substance, nothing more nor less than a clause enacting that a special rule of construction shall apply to conveyances of land to a railway company. It inverts the ordinary rules of construction of such conveyances, and mines are deemed to be excepted unless expressly named and conveyed. We are here met in limine with the question to what lands does this apply? It has been suggested that it applies only to lands taken by the exercise of compulsory powers. I can find no words justifying such a limitation. The lands to which it applies must, of course, be lands taken or held by virtue of some Act incorporating these clauses; but, if that is the case, there is nothing to exclude from its operation any lands acquired by the railway company. The familiar procedure for taking land compulsorily is only an alternative which (within certain limits of time) may be resorted to by the company when they fail to come to an agreement with the owner as to such of

the scheduled lands as they desire to take. The expiry of that period leaves the company still entitled to take those lands, and also to take other lands for extraordinary purposes, but it must be done by agreement. No reference is made in clause 77 to the lands having been acquired by any special procedure, and I am, therefore, of opinion that the clause applies to all lands acquired and held by a railway company under, or by virtue of, any Act incorporating this group of clauses.

But this does not exhaust the effect of s. 77. By implication, it gives to the railway company the power to purchase lands without purchasing the mines that lie beneath the surface, except so far as they are necessarily involved in the operation of constructing the railway. Indeed, it is scarcely going too far to say that they indicate that the normal procedure in the purchase of the lands on which the railway is constructed will be of this kind, and that the mines will be excepted in the purchase. All the decided cases agree in this view, and at one time there was considerable judicial authority in favour of the view that railway companies are not empowered to buy the mines under the lands taken by them. I can see no justification for this view in the language of these sections. Sect. 77 appears to contemplate mines being expressly purchased, just as much as their not being purchased, with the lands taken, and subsequent decisions have established that this is the true interpretation of the statutory clauses. But I have no doubt that in 1845, when these clauses were first put into shape, the Legislature contemplated that railway companies would usually content themselves with purchasing the surface only. It must be remembered that these clauses were the outcome of practical experience in railway and canal Bills. The undertakers, in schemes that preceded the Act, had appreciated the importance of being allowed to postpone the purchase of mines until such time as it might be necessary to deal with the question practically, and they had in their special Acts inserted clauses closely resembling the form adopted by the statute of 1845 to enable them to do so. The Legislature, therefore, had good reason to believe that the permitted procedure would generally be adopted in practice; and experience has shewn that this belief was correct.

C. A. 1911

LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY.

Fletcher Moulton L.J.

But if the purchase of the surface land carried with it the ordinary rights of support from subjacent or adjacent mines, a railway company would have to pay a price comparable with, if not substantially equal to, the cost of purchasing the freehold of the land including the mines. This is evident because the right of support from the subjacent mines would place an embargo upon the minerals lying within them except so far as they could be worked without letting down the surface of the railway. Still more important would be the effect of such a purchase on adjacent mines. It would place a similar embargo on the minerals lying under a broad strip running along the railway on each side of it. The area thus affected might be far larger than the area of the corresponding portion of the railway itself, and the interference caused to the working of such mines might be nearly as complete as in the case of subjacent mines. To give adequate relief to railways running through mining districts therefore, the Legislature must go further than merely exempting them from the necessity of the immediate purchase of the mines lying beneath the railway, whose support might be necessary for them. It is to meet the difficulties of the situation created by this state of things that the remaining clauses of the fasciculus are addressed.

The keynote of the legislative scheme in this respect is given by clauses 78 and 79. Their general effect is, in my opinion, to establish on a statutory basis the reciprocal rights of the railway company, on the one hand, and the owners, lessees, or occupiers (whom for brevity's sake I shall hereafter refer to as the owners) of mines lying under or near the railway on the other. These reciprocal rights are different from, and inconsistent with, the common law right of vertical and lateral support, and entirely replace those rights as between the railway company and the owners of the mines, so that on the one hand the railway company cannot claim those common law rights as against the mine owners, nor can the owners of the mines claim that freedom of working which is compatible with the duties of support, and is, therefore, permitted by the common law. In return for this novel servitude imposed upon them by the Legislature, the owners of such mines have sundry rights and

privileges granted to them. These rights and privileges are given to them by statute and not by contract, and they are unaffected by any transactions between the railway company and third parties. The area throughout which these relationships obtain becomes, therefore, a realm in which we have only to look to the statute to determine the rights and burdens of the two parties, or either of them.

I shall now proceed to examine the language of ss. 78 and 79 in order to justify these conclusions. The language of s. 78 is quite general. The section applies to all mines lying under the railway, or within the prescribed distance. There is no reference whatever to the title under which such mines are held. The fact that they lie within the prescribed distance is necessary and sufficient to bring them within the scope of the section. It provides that, so soon as the owner of such mines is desirous of working them, he shall give notice to the company of his intention so to do, and the company may inspect the mines, and if they are willing to pay compensation for the mines, or any part of them, they are to be left unworked. This is a clear interference with the rights of those interested in the mines. If the parties had been left to their common law rights, the mines could, in any case, have been worked subject to sufficient support being left for the superjacent or adjacent surface. But under s. 78 the railway company has the right to forbid any working of the mines or of such part of them as it thinks fit. These new rights of the railway company, when taken together with the provisions as to the correlative rights of the mine owners, are so wholly incompatible with the common law rights of support from subjacent and adjacent strata, that one is driven to the conclusion that, as between the railway company on the one hand and the mine owner on the other, the common law rights and obligations must be deemed to be taken away entirely so far as the mines are concerned. This doctrine has now been recognized by the Courts, and I cannot see how they could have come to any other conclusion without involving the whole subject in a hopeless tangle of conflicting rights and obligations.

While s. 78 deals with the case where the railway company, after receiving the notice, decides to stop the working and pay

C. A. 1911

LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY.

Fletcher Moulton L.J.

compensation, s. 79 deals with the case where it does not state its willingness to pay compensation. The language of this section is equally general, and equally emphatic, with that of s. 78. It provides that, in such case, it shall be lawful for the owner of the mines for which the railway company shall not have agreed to pay compensation to work those mines, the only restriction being that it is to be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate. In my opinion this gives to the owner of the mines a statutable right as against the railway company to work those mines. No exceptions or limitations to this right are expressed, and I can see no ground for holding that any are implied; and I am of opinion that the right is absolute as against the railway company, no matter what rights the railway company may have acquired from third parties. Sect. 79 is the complement to s. 78, and every mine that is under the burden of the rights of the railway company under s. 78 has the privileges as against that railway company which are given by s. 79.

It will be seen that not even when the railway company refuses to give compensation is the mine owner relegated to his common law position. The right of working the mines as he wishes is taken from him. He may only work them according to the usual manner of working such mines in the district where the same shall be situate, and in a manner proper and necessary for the beneficial working thereof; and the latter part of the section gives to the railway company most effective statutory remedies against him in case he does not observe these new restrictions on the working of the mines. The language in which these rights and remedies are given to the railway company is just as general, and just as absolute, as the language of the rest of the section, and of s. 78, and gives complete support to the view that, under these sections, the mutual rights are entirely statutable, and are independent of any rights which either party may have acquired aliunde.

Sects. 80, 81, and 82 deal with mining communications. They apply only to cases where the mines of the owner extend on both sides of the railway. By s. 80 he is empowered to make proper

airways, &c., through the mines which the railway company has elected to preserve unworked, so as to enable him to obtain convenient access to the mines on the further side of the railway and thus work them. This is in order to lessen the damage from severance, which would ordinarily be very great. Sect. 81 provides that whatever damage from severance may still remain after these communications have been made must be paid by the railway company. Sect. 82 is a very peculiar section. It provides that where the railway company has prevented the working of mines and consequently the powers given by s. 80 to make airways, &c., have come into force, the owners or occupiers of lands lying over the mines may claim for any damage done by the making of the airways. This shews that the Legislature intended the right to make airways, &c., to be so absolute that it was not to be affected by the existence of a duty to give support to the lands above the mines in whosesoever hands those lands might be. The owners of the surface are not to be able to stop the making of the mining communications, but are to be entitled to receive compensation for the injurious effect to their surface lands by the construction of such communications. Here, for the first time in this group of clauses, the Legislature is forced to deal with the rights of third parties. In order to spare the railway company the compensation for the grave industrial loss which might be caused by severance, it has proposed to give to the mine owners the absolute right of making mining communications through the subjacent and adjacent mines. But it may be that the making of these communications will interfere with the common law rights of surface owners other than the railway company. It follows that the Legislature must now choose whether it will allow these surface owners to insist on their rights and thus compel the economical loss caused by severance, or will interfere with their rights sufficiently to prevent that loss at the cost of giving them compensation for any actual injury caused to them thereby. In accordance with its usual practice it has chosen the latter course. It will be noticed that this is the only clause in the fasciculus which gives compensation to third parties, and that it only applies to works constructed under the powers of s. 80. It is legitimate to draw therefrom the inference

C. A. 1911 — LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY. — Fletcher Moulton L.J.

that the rights of third parties are not intended to be affected by the provisions of s. 79, a conclusion to which one would, I think, naturally have come even without the assistance given by the presence of clause 82.

Sects. 83 and 84 relate only to inspection and do not concern us here. But s. 85 is a clause dealing with the general case where mines have been worked contrary to the statutory provisions. It enables the railway company in such a case to give notice to the owners to adopt such means as may be necessary or proper for making safe the railway and preventing injury thereto, and also enables the railway company to do the work at the owner's expense should he neglect to comply with the notice. Here again the language is perfectly general and imperative, and the clause may be said to complete the legislative scheme of special rights and special obligations as between the railway company on the one hand and the mine owner on the other, by giving to the railway company adequate and suitable remedies for any neglect by the mine owners of the obligations imposed upon them.

Throughout the whole of the sections subsequent to s. 77 the phrase "such mines" is used. This refers us back to s. 78, and from its language we learn that by "such mines" is meant "any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom." The special legislation, therefore, of this fasciculus of clauses applies only to that area, and I can see no possible doubt that the heading of the fasciculus refers to this area, and to this area only, when it speaks of "mines lying under or near the railway." There is nothing forced in this interpretation. The prescribed distance was obviously intended to cover any mines the working of which would affect the railway, and in 1845 a distance of forty yards would have seemed ample for this purpose. This is the dominant idea throughout the whole of the fasciculus. The word "near" in the heading of a fasciculus of clauses dealing with such a subject must be treated as defined by the clauses to which it relates, and we must hold that it refers to the only mines mentioned therein, especially as we find them defined by their

distance from the railway, and by that only. I mention this because Pearson J., in an application for an interim injunction in the case of *Midland Ry. Co.* v. *Miles* (1), suggests that this heading includes mines which lie at a greater distance. I cannot think that this suggestion is well founded. No notice appears to have been taken of this suggested interpretation by Stirling J. at the trial of the action (2), nor in any later case, but it appears to have found its way into some of the text-books, and is likely, I think, to cause confusion.

It remains to apply the above conclusions to the facts of the present case. Take, first, the question of the right of the railway company to support for their lands from mines lying outside the forty yards limit. There is nothing in the fasciculus of clauses that applies to the region outside, and, therefore, there is nothing to raise any implication that the rights of the owners of the mines situated therein relative to the railway company on the one hand, or of the railway company relative to them on the other, are interfered with in any way. Both parties, therefore, must be supposed to possess their common law rights. The railway company is the owner of the railway and all the strata that lie below it other than the mines. It has acquired this by purchase, and, though within the forty yards the rights that this purchase brings with it are peculiar and statutable, there is nothing in the statute to interfere with the rights that it would ordinarily bring with it outside that distance. If, therefore, the mines lying outside that distance cannot be worked without letting down the railway, the railway company is entitled to an injunction to prevent their being worked. If, and so far as, the owners can work them without letting down the railway they are, of course, free to do so.

The next point is as to the rights acquired by the railway company by the purchase of the seams of coal which it has acquired by agreement. So far as the space outside the forty yards is concerned, those seams are entitled to the same support in the hands of the railway company that they would have been entitled to in the hands of their former owners. But the case is very different within the prescribed distance. There they add

(1) 30 Ch. D. 635. (2) 33 Ch. D. 632.

C. A. 1911 — LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY. — Fletcher Moulton L.J.

nothing to the rights of the railway company excepting that, inasmuch as they belong to the railway company, they cannot be worked by any one. But their possession by the railway company leaves unchanged the rights of the railway company given by s. 78 as against the owners of mines within the forty yards, and therefore it cannot affect the corresponding privileges given to the owners of such mines by s. 79. If the railway company, after receiving notice of the intention to work, is not willing to give compensation for such portion of the mines as it desires left unworked, the owners have, under s. 79, a statutable right as against the railway company to work the mines.

Counsel for the appellants laid much stress on the fact that the conveyance of the Stone Coal and the Cromwell Bed purported to convey the fee; and it was argued that this must carry the common law implication of support, and prevent the application of the code. I cannot follow this argument. The original purchase by the railway company was of the fee of all the land from the surface downwards with the exception of the mines. It carried with it full right of support for all these strata from the adjacent soil except so far as the adjacent mines are concerned, for it must always be borne in mind that the conclusion that the right of support from those mines is gone (which is now settled law, having been repeatedly affirmed by the Courts) is not based on any express language taking it away, but on the statutory provision of rights and obligations between the railway company and owners of mines within the prescribed area which are incompatible with its existence. It is, therefore, only affected so far as these provisions apply. A neighbouring landowner would not be entitled to make an excavation in the ordinary soil and let down the railway thereby. This would not be because the mining clauses apply, nor could the railway company require him to give notice of working and direct him not to work. He would not be an owner of mines desiring to work them because they are not mines at all. It would be because the ordinary common law implication of support to the lands purchased by the railway company by strata and soil, other than mines, is not in any way interfered with by the mining

clauses. Nothing is put in its place, and hence it must be taken to be unaffected. The clauses relate only to the support from mines within a defined area, and their presence leads to no presumption that aught but that support is affected by this special legislation.

These considerations lead directly to the conclusion that the railway company gained nothing in the way of adjacent support by the purchase of the subjacent portions of the Stone Coal and the Cromwell Bed. They might (if they had so chosen) have included these in the original purchase. Their so doing would only have added two shallow strata to the strata they so acquired. How could that have affected the operation of the mining clauses? They would still have been the railway company, and, as such, would have had the rights, and could have exercised the powers, given by s. 78, and accordingly the owners of the adjacent mines would have had the rights and been under the disabilities prescribed by s. 79. What difference then can it make that the strata were taken at different times and not at one and the same time? If we accept the conclusion which, to my mind, is irresistible that the mining clauses relate to the holdings of land by the railway company and do not depend on any special procedure by which the property in the lands was obtained, the position of the parties in the present case is precisely the same as if, in the original purchase, these two seams were included.

The case of *Pountney* v. *Clayton* (1) illustrates strikingly the effect of these mining clauses. In that case a railway company purchased land for their line, but did not purchase the mines under it. Subsequently they sold part of such land as superfluous to the predecessors in title of the plaintiff. The owner of the mines under the land worked those mines so as to let down the surface of the land so sold. It was held that he was entitled to do so. The railway company by their purchase did not acquire the right of support from the mines, although they did acquire a right to stop the working of them on giving compensation. But this was a statutory privilege which they possessed as a railway company, and which they could not,

(1) 11 Q. B. D. 820.

C. A. 1911

LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY.

Fletcher Moulton L.J.

therefore, pass on to the purchasers of the lands when they sold them. All that they could pass on to those purchasers was their rights of property, that is to say, the property in the land without the mines, and without the right to support from those mines. The plaintiff in the action, therefore, failed because these rights did not entitle him to restrain the working of the mines so as to let down his surface.

It is not necessary to review all the numerous cases referred to in the argument. It is dangerous in such a case as this to rely on decisions on the rights under Inclosure Acts, or under Acts earlier than the Railways Clauses Consolidation Act, 1845, and differing in language from it. The case of *Fletcher* v. *Great Western Ry. Co.* (1), however, raised clearly, and I think for the first time, the question whether a railway company was entitled to claim common law rights of support for lands taken by it. The Court of Exchequer decided that it was not, and Baron Martin termed the Railways Clauses Consolidation Act, 1845, "a code of law under which these public undertakings are constituted," a phrase which has frequently been adopted by the Courts. The decision went to the Exchequer Chamber and was supported. Shortly afterwards a landowner was desirous of carrying the point up to the House of Lords, and, accordingly, in *Great Western Ry. Co.* v. *Bennett* (2) the following procedure was adopted. The railway in that case severed a portion of the seam so that it could not be worked, and it was referred to an arbitrator to determine the amount of compensation to be paid. This depended on whether the owner of the seam was entitled to work it out, or whether he must leave support to the railway, and accordingly (no doubt by agreement between the parties) the arbitrator stated his award in the form of a special case for the opinion of the Court, and assessed the amount which would be due in case the owner was entitled to work the seam out, and also the amount that would be due if he were required to leave support. The special case appears not to have been argued before the Court of first instance, or Exchequer Chamber, because it was admitted that

(1) 4 H. & N. 242, 252; 5 H. & N. 689. (2) L. R. 2 H. L. 27.

it was governed by the decision in the preceding case of *Fletcher* v. *Great Western Ry. Co.* (1) An appeal was brought to the House of Lords and was dismissed. The decisions of Lord Chelmsford and Lord Cranworth in this case form the basis of the law on the subject. Lord Westbury, though agreeing in the conclusion, took a different view of the effect of the clauses in some points not material for that decision, such as whether the railway company were entitled to purchase mines, and as to whether the counter-notice must be given within the thirty days. It is admitted that, in these respects, later decisions have not adopted his views.

I have felt it necessary to refer to these two cases because a most extraordinary point was made in the Court below, and apparently influenced the decision of the learned judge. The defendants in the present case produced the House of Lords' case in *Bennett* v. *Great Western Ry. Co.* (2), which contains, as part of the award of the arbitrator, a plan shewing in blue the area affected by severance, and with regard to which he found that the obligation to give support would necessitate one-third of the coal being left in the shape of pillars. They contended that, if measurements were taken of this blue area, it would be found that a portion of it was beyond the forty yards, and therefore they contended that in dismissing the appeal the House of Lords decided that land outside the forty yards was not under the obligation to give support. They admitted that any such decision must have been unconsciously given, for it is evident, beyond the possibility of dispute, that no such fact was brought to the notice of the House of Lords, nor appeared in any portion of the proceedings. Indeed, I do not think that it could have been brought before the House of Lords in such proceedings. If it had been intended to raise any such point, it must have been brought before the arbitrator in the first place, because it is clear that it was the intention of the parties that the quantum should be ascertained by him on each of the hypotheses contended for by the respective parties. Moreover, if any such point had been raised, it would have been impossible to treat the case as covered by *Fletcher* v. *Great Western Ry. Co.* (1), since that

(1) 4 H. & N. 242 ; 5 H. & N. 689. (2) L. R. 2 H. L. 27.

C. A. 1911 — LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY. — Fletcher Moulton L.J.

raised no question with regard to the support from mines outside the prescribed distance. These facts are not controverted by the defendants in the present case, but they claim that, although the fact was not referred to in any of the proceedings before the Courts, or brought to the notice of the House of Lords, yet because the fact existed, though unknown to the noble Lords who took part in the decision, they must be taken to have unconsciously pronounced judicially upon it. To my mind, it is difficult to treat the point seriously or even with gravity. There may be some warrant for the contention that a Court is bound to satisfy itself as to its jurisdiction, although I have known cases in which this Court has declined to consider that the fact that the House of Lords has decided an appeal where the question of its jurisdiction has not been raised is conclusive that such jurisdiction exists. But with regard to the contentions between the parties there can be no possible inference of the kind. It is always open to a litigant who is sui juris to elect not to raise a particular contention in his own favour, and if the railway company in *Bennett's Case* (1), either from inadvertence or from choice, did not raise the contention that some portion of the land was outside the prescribed distance, and that this affected their rights, no Court is bound or even entitled to decide upon the point. But what is of more importance is that they certainly did give no decision on the point, and the doctrine of unconscious infallibility in judicial decisions smacks too much of superstition to commend itself to my acceptance.

Frequent reference was made during the argument of the present appeal to the decision of this Court and of the House of Lords in the case of *Manchester Corporation* v. *New Moss Colliery, Ld.* (2) That was not a case under the Railways Clauses Consolidation Act, 1845, but under the Waterworks Clauses Act, 1847, and although there is a broad and general similarity between the mining clauses in the two Acts, they differ substantially. Sect. 22 of the Waterworks Clauses Act, 1847, which corresponds to s. 78 of the Railways Clauses Consolidation Act, 1845, begins with the proviso "Except where otherwise provided for by agreement between the

(1) L. R. 2 H. L. 27.

(2) [1906] 2 Ch. 564; [1908] A. C. 117.

undertakers and other parties." These words make it clear that the undertakers may contract with third parties for the support of their reservoir from subjacent and adjacent mines in such a way as entirely to oust the machinery provided by the section. But there is a matter of still greater importance. It will be found that, if the undertakers are not willing to give compensation, the right given by s. 23 (which corresponds to s. 79 of the Railway Act) is given in the form that "it shall be lawful for him" (the owner of the mines) "to work the said mines as if this Act and the special Act had not been passed." These words leave it quite clear that the section does not give an absolute right to work the mines, but only relegates the parties to their common law rights. This was specifically the ground on which the decision of this Court in *Manchester Corporation* v. *New Moss Colliery, Ld.* (1) was based. In that case the Manchester Corporation had bought from a man named Taylor a freehold, and it was admitted that the purchase included the mines. On the defendants giving notice to work the mines within forty yards of the reserved portion belonging to the Manchester Corporation, the corporation did not exercise their power of stopping that working and declined to give compensation. The parties, therefore, were relegated to their common law rights; and, inasmuch as the corporation were the owners of the freehold of the Taylor land, and, if the Acts had not been passed, there would have been no modification of the rights passed to the Manchester Corporation by the purchase of that land in fee, the defendants were held not to be entitled to work the mine so as to let down the Taylor land. The circumstances of a railway company and a waterworks company differ considerably, and it would not be difficult to give substantial reasons why the Legislature should treat the problem of support from mines differently in the two cases. But we have not to deal with the reasons which moved the Legislature. It is sufficient to say that qualifying language is introduced into both of these sections in the later Act shewing that the substitution of the special rights and obligations with which we have been dealing is not absolute, and for all time, in the case of waterworks, as it is in the case of

(1) [1906] 2 Ch. 564; [1908] A. C. 117.

C. A. 1911 — LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY. — Fletcher Moulton L.J.

railways, but that it may be suspended altogether by contractual arrangement with third parties, and in any case its effect ceases (except as to restrictions on the method of working the mines) if the undertakers decline to give compensation.

There is, therefore, nothing in the case of *Manchester Corporation* v. *New Moss Colliery, Ld.* (1) which in any way clashes with the conclusion to which I have come in the present case, and, indeed, allowing for the difference in language of the two Acts, the whole of the reasoning of the decision is in harmony therewith. It follows, therefore, that I am of opinion that this appeal succeeds so far as the second injunction is concerned, but that it fails so far as regards the claim of the railway company to an injunction to restrain the working of the Beeston Top Bed within the prescribed distance.

Buckley L.J. The first question in this case is whether the code contained in ss. 77 to 85 of the Railways Clauses Consolidation Act, 1845, applies to the case of minerals lying beyond the forty yards or other prescribed distance under s. 78. It is obvious that, as regards such minerals, it does not apply so as to preclude the mineral owner from working before giving notice, or so as to enable the railway company to prevent him from working by paying compensation. But it is contended that it does apply so as to deprive the railway company of any right to support from the soil lying beyond the forty yards. This contention is rested upon some words used in the opinions of the noble and learned Lords in *Great Western Ry. Co.* v. *Bennett.* (2) Upon measurement of the map which is attached to the House of Lords' case, it is a fact that, to the extent of, say, about one quarter of the blue land, the land there did extend beyond the forty yards. But there is no trace anywhere that any counsel in the case, or any one of the judges, or any of the noble and learned Lords whose opinions are relied upon, was aware that this was the case; and not a word of argument or of judgment is addressed to it.

In *Fletcher* v. *Great Western Ry. Co.* (3) it was decided that where the mineral owner has given notice under s. 78, and the

(1) [1906] 2 Ch. 564; [1908] A. C. 117. (2) L. R. 2 H. L. 27.
(3) 4 H. & N. 242; 5 H. & N. 689.

railway company has not elected to pay compensation under s. 79, the mineral owner is entitled so to work the minerals included in the notice as to let down the surface. *Great Western Ry. Co.* v. *Bennett* (1) was not in form, but in fact, an appeal to the House of Lords from the decision in *Fletcher* v. *Great Western Ry. Co.* (2) All the observations of the learned Lords must, in my judgment, be read as having relation to the state of facts to which their opinions were addressed. The mineral owner had given notice under s. 78, the railway company were willing to pay compensation. The decision was that the mineral owner, having given his notice, was entitled to say, unless you compensate me, I shall, by virtue of s. 79, be entitled to let down the surface; and the compensation must be assessed upon that footing. The reasoning and the conclusion have no bearing upon any question other than the question what compensation is payable in respect of minerals in respect of which the Act gives, in those circumstances, a right to compensation, namely, minerals lying within the forty yards. I find nothing in that decision which controls me in determining the general question which the respondents have argued in the present case, namely, whether the effect of ss. 77 to 85 of the Act of 1845 is, to use the words of Lord Cranworth, to "get rid of all the ordinary law on the subject" of the right to support, as regards minerals, between a railway company and a mineral owner, wheresoever the minerals may lie. When Lord Cranworth used the words I have quoted, he used them, in my judgment, only with reference to the case before the House—the case, that is, where the mineral owner could give, and had given, notice.

Sir Alfred Cripps has referred to several cases in which *Great Western Ry. Co.* v. *Bennett* (1) has since been referred to, and has argued that the decision is mentioned as if it were of general application, and not limited, as I think it was, to the case which the House had under consideration. The answer, I think, is that they were all cases in which the facts were such that the limited, and not the general, question arose. In most of them it is plain, from the language used, that the minerals referred to, whether they did or did not lie within the forty

(1) L. R. 2 H. L. 27. (2) 4 H. & N. 242; 5 H. & N. 689.

C. A. 1911

LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY.

Buckley L.J.

yards, are not minerals as to which the mineral owner had not given, and could not give, notice under the statute, but were minerals within the forty yards as to which notice had been, or could be, given. Take, for instance, Lord Herschell in *Midland Ry. Co.* v. *Robinson.* (1) From the expression "When desirous of working the mines he should give the company an opportunity of purchasing them," it is obvious that he is speaking of mines which could be the subject of a notice; that is to say, mines within the forty yards. Or take *In re Lord Gerard and London and North Western Ry. Co.* (2) The question was whether, under a notice to treat for land including minerals except coal, the vendor was entitled to compensation for coal which he could not get without derogating from his grant of other minerals to the company. It was held that he was not, because such coal fell within ss. 78 and 79; and the company need not pay for them until the owner was desirous of working them. When in that case it was said by Lord Esher (3) that these sections determine the law "to the exclusion of any common law right," and where similar words were used by Rigby L.J. (4), the language was obviously addressed to a case, such as was before the Court, in which the section applied. A similar observation will be found to be true in the other cases. To treat such words as those above referred to, or the following words of A. L. Smith J. in *Consett Waterworks Co.* v. *Ritson* (5), "It has been held by the highest authority that where a railway company compulsorily purchases from an owner who at the date of the notice to treat is owner both of the surface and the minerals thereunder, and the company gives no notice to treat for the minerals, it purchases solely the surface, and obtains no right to support at all," as being used literally is extravagant. No one has contended, or could contend, for instance, that the common law right of support is in any way affected by the Act except in the matter of getting minerals. If there are no minerals, or as regards support by soil other than minerals, the right of support remains wholly unaffected. The

(1) 15 App. Cas. 28.
(2) [1895] 1 Q. B. 459.
(3) [1895] 1 Q. B. 464.
(4) [1895] 1 Q. B. 471.
(5) 22 Q. B. D. 326

decision in *Great Western Ry. Co.* v. *Bennett* (1) is that where notice has been given under the Act, and compensation not offered, the common law right as regards minerals the subject of the notice is, as between grantor and grantee, swept away, and the statutory code is substituted for it.

The argument which Sir Alfred Cripps has pressed upon us is that the effect of ss. 77 to 85 is to exclude in every case the application in favour of a purchasing railway company of any common law right of support from minerals wheresoever they lie, and to substitute for it a right created in the railway company by the Act of staying the hand of the mineral owner in getting such minerals as lie within the forty yards. It is the argument which in *New Moss Colliery, Ld.* v. *Manchester Corporation* (2) he used in the House of Lords in reference to the similar sections of the Waterworks Clauses Act, and which Lord Loreburn summarizes and negatives. (3) In my opinion ss. 77 to 85 of the Act not only do not disturb, but, on the contrary, by inference affirm, the continuing application of the ordinary common law right of support, but, in certain events, supersede it, and replace it by what has been called the code. Until the mineral owner has given his notice, and the thirty days have expired, the railway company enjoys in fact—I think I may say enjoys as of right—such support as the minerals in fact give. By payment of money it can preserve to itself the right to this support. If the company is not prepared to pay money, there comes into existence for the first time a right to let down the surface created in the mineral owner by s. 79. After the purchase of the surface by the railway company, the mineral owner has not a right, but only a contingent right, to let down the surface. The contingency is that, after notice, the company does not pay compensation. Sect. 79 may be described as a defeasance upon the right to support. In an event, the mineral owner may defeat a right to support which, but for that event, exists in the railway company.

In the course of the argument I put to counsel a case of this kind. Suppose there are no minerals under the purchased land,

(1) L. R 2 H. L. 27. (2) [1908] A. C. 117.
(3) [1908] A. C. 122, 123.

C. A. 1911 — LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY. — Buckley L.J.

or within the forty yards, but there are minerals beyond the forty yards; and suppose that such minerals belong to the vendor to the company. What is there in the Act to destroy the right to lateral support which, but for the Act, the purchasing company would enjoy? I can find nothing. Moreover, the construction for which the respondents contend involves this result. But for the Act, the railway company would have been entitled to support by the land, both within and without the forty yards; the Act has protected the company within the forty yards, but has left them unprotected beyond the forty yards. The Legislature, according to the argument, has intended to take the common law right to support away in both cases; substituting a protection in the one case, and substituting nothing in the other.

The argument is advanced that if the owner has to give lateral support beyond the forty yards, he must give it without that right to compensation which he enjoys within the forty yards. The answer is that he is not deprived of compensation. It will be an item to be taken into account under the notice to treat. The fact is that within the forty yards he does not get compensation under the notice to treat because he can get it under s. 78. He is entitled to it in each case; the only difference is as to the date at which he is entitled to it. Without the forty yards, he is entitled to it at once. Within the forty yards, he is not entitled until he gives notice to work.

The decision in *Manchester Corporation* v. *New Moss Colliery, Ld.* (1) gives little if any assistance in resolving the present case. That case was under the Waterworks Clauses Act. Sect. 23 of that Act corresponds to s. 78 of the Railways Clauses Consolidation Act, but, in giving power to the mineral owner to work, qualifies it by the words "as if this Act and the special Act had not been passed." There are no similar words in the Railways Clauses Consolidation Act. The effect of those words was that the mine owner who did not get compensation was authorized to work as if the Act had not been passed—that is to say, if he had, apart from the Act, a right to let down the surface, he might do so: if he had no such right, the Act did not enable him to do so. It was

(1) [1906] 2 Ch. 564; [1908] A. C. 117.

accordingly held in that case that if A. be the owner of land and minerals, and B. the owner of adjacent land and minerals, A.'s right as against B. to lateral support exists independent of the Act; and there is nothing in the Act to take it away. In such case it is immaterial whether the minerals are within or without the forty yards. But if A. and B. are the same persons, there is no right in the A. lands to a right of support by the B. lands; and the basis of the decision is swept away. That case, therefore, is inapplicable to the present for two reasons, namely, first, because the words "as if this Act and the special Act had not been passed" are not in the Railways Clauses Consolidation Act, and, secondly, because the owner of the surface and the owner of the minerals in question are here not different, but the same persons. Apart, however, from that decision, and for the reasons which I have assigned, the appellants are, in my opinion, right in respect of the first question.

The second point in the case lies within a small compass. In 1878 the railway company acquired the leasehold interest and the reversion in fee in two strata, namely, the Stone Coal and the Cromwell Bed. Nothing, in my opinion, turns upon the words of reference to the Act which are found in the assignment of the leasehold interest. The company paid, not compensation money as the price that the owners should not work, but purchase-money as the price of an estate in the land. It was, however, such a purchase as that subjacent minerals would not pass. It was a purchase of defined strata alone. To such a case s. 77 has no application. That section deals only with the case in which lands are so purchased as that, but for the section, minerals would be included. It has no reference to the case in which strata are purchased; the case in which no exception of other minerals can be made, because the thing to be excepted is not part of the thing from which it is to be an exception. Sect. 78, however, which follows, is a section of general application. It applies as against an owner of minerals who is not a vendor to the company at all. It applies equally to an owner of minerals who sells a stratum of minerals and retains other strata. It is, however, a section which becomes material only if it appears to the company that the working of the minerals is likely to damage the works of the

C. A. 1911 — LONDON AND NORTH WESTERN RAILWAY v. HOWLEY PARK COAL AND CANNEL COMPANY. — Buckley L.J.

railway. The protection afforded to the railway company is a protection of the surface, and not a protection of subjacent strata. It may be that works which would let down the subjacent purchased strata would also necessarily let down the surface; and, if so, s. 78 becomes material. But it applies not as a protection to the strata, but as a protection to the surface. As against workings, if there could be any, which would not injure the surface, but would let down the stratum, the owner of the stratum is, I conceive, entitled to the common law right of support; but this consideration is probably academic. The surface and the strata which the company purchased here belong to the same vendor. It results that the doctrine of the *New Moss Colliery Case* (1) does not apply. Unless it were made out, as it is not, that workings might let down the purchased strata, without letting down the surface, no discrimination is to be made by reason of the purchase of the strata.

It results that, in my opinion, upon the second question, the respondents are right in the sense that the plaintiffs are not entitled, by reason of the purchase of the strata, to any larger injunction than they could otherwise obtain.

The plaintiffs are, I think, entitled to an injunction to restrain the defendants, their servants and agents, from working the Top Beeston Bed outside the distance of forty yards from the Morley tunnel or works of the plaintiffs in such a manner as to withdraw lateral support from the said tunnel and works, but not to any larger injunction. I agree with the Master of the Rolls that the plaintiffs shall have the costs of the action other than the costs presently given to the defendants. The defendants to have the amount, if any, by which the costs were increased by the issue which Sir Robert Finlay abandoned in this Court. The plaintiffs to have the costs of the appeal.

Solicitors: *C. de J. Andrewes; Rawle, Johnstone & Co., for Mason, Fernandes & Greaves, Wakefield.*

(1) [1906] 2 Ch. 564; [1908] A. C. 117.

H. B. H.

CARSHALTON URBAN DISTRICT COUNCIL *v.* BURRAGE.

NEVILLE J.
1911
Feb. 22.

[1910 C. 3349.]

Local Government—"Dangerous Place"—Chalk Pit—Excavation "in any situation fronting, adjoining, or abutting on" a Street—Intervening Strip of Land—Power of Local Authority to fence—Public Health Acts Amendment Act, 1907 (7 *Edw.* 7, *c.* 53), *ss.* 3, 30, 31.

The Public Health Acts Amendment Act, 1907, s. 30, enacts with respect to the enclosing of dangerous places, that "if in any situation fronting, adjoining, or abutting on any street . . . . any excavation or bank" is for want of sufficient enclosure dangerous to persons lawfully using the street, the local authority may require the owner to enclose the same so as to prevent any danger therefrom and, on his default, may enclose the same and recover the expense thereof from him summarily as a civil debt.

An unfenced ancient chalk pit was separated from a highway that was a street by an unfenced strip of land of varying width. The defendant was the owner of the strip of the land but not of the pit. From erosion caused by the weather a few feet of the strip of land had in course of years fallen or slipped down into the pit so that the edge of the pit had become enlarged and was now within the strip of land:—

Held, that the pit was "in a situation fronting, adjoining, or abutting on" the highway and, on the evidence, was a danger to persons lawfully using the highway; and, therefore, that the local authority had power under the section to require the defendant to erect a fence on his strip of land enclosing the pit.

ACTION.

The defendant was the owner of a strip of land abutting on its southern side on a highway, known as the Banstead Road, which was a street. The strip of land on its southern side extended some 295 feet along the road and varied in width from 50 feet to 14 feet. On its northern side was an ancient excavation or chalk pit of considerable size and depth, and the edge or bank thereof extended along the whole length of the defendant's strip of land and some feet beyond. The chalk pit had not been worked for very many years. It belonged to one Kurtz, who had leased it with his adjoining land to one Wood, a farmer, who used it for the purposes of his farm. There was no fence

NEVILLE J
1911
CARSHALTON URBAN COUNCIL v. BURRAGE.

between the defendant's strip of land and the road, and there was no fence or protection between the strip of land and the chalk pit. The road, the strip of land, and the chalk pit were within the plaintiff council's district.

Complaints having been made to the council that the chalk pit was dangerous to persons using the highway, the council on October 5, 1910, caused the defendant to be served with the following notice (omitting formal parts):—

"Whereas in a situation adjoining and abutting on a certain street known as Banstead Road in the district of the Carshalton Urban District Council there is an excavation or bank which for want of enclosure is dangerous to the persons lawfully using the said street. And whereas you are the owner of such excavation or bank. Now we the Carshalton Urban District Council by this notice hereby require you within the space of fourteen days from the date hereof to protect or enclose the said excavation or bank so as to prevent any danger therefrom.

"And take notice that if you shall neglect to comply with the requirements of this notice within the prescribed period the said council may cause such works as they think proper to be done for effecting such protection and enclosure and the expenses thereof will be payable by you and may be recovered summarily as a civil debt."

The defendant did not comply with the notice, and thereupon the council erected a fence on the whole length of his strip of land on the side next to the chalk pit at a cost of 18*l.* 15*s.* 5*d.* The defendant pulled down the fence. The council re-erected the fence and commenced this action, claiming (1.) an injunction to restrain the defendant, his servants or agents, from pulling down, destroying, or otherwise interfering with the said fence erected by the plaintiffs for the protection or enclosure of the said excavation and bank and from interfering with the plaintiffs in the exercise of their duties and powers under the Public Health Acts; and (2.) payment of the 18*l.* 15*s.* 5*d.*

By his defence the defendant alleged that the plaintiffs had no statutory or other authority for serving the notice and for erecting the fence, and that he was lawfully entitled to remove

the fence as being an obstruction illegally erected upon his land by the plaintiffs.

The road was metalled right up to the defendant's strip of land, and there was no footpath on that side of the road; the strip of land was rough grass covered in parts with scrub and blackthorn, but fairly open where it was narrowest. Its side adjoining the road was a few inches above the level of the road with a gradual slope upwards to the edge of the pit. There was evidence that formerly the strip of land had been wider, and that about 12 feet of its surface next to the side of the pit had in course of years by erosion caused by the weather fallen or slipped down into the pit, and that it was a dangerous place. It also appeared that in dark nights or foggy weather persons might easily step off the road on to the strip of land at the point where it was narrowest.

W. L. Richards, for the plaintiffs. The question turns mainly on the construction of s. 30 of the Act. (1) The plaintiffs have obtained an order of the Local Government Board under s. 3 of the Act bringing Part II. of the Act, which comprises ss. 15 to 33, into operation in their district. On the evidence the dangerous part of the edge or bank of the excavation or pit is now on the strip of land of which the defendant is the owner, and the plaintiffs are entitled under s. 30 to require him to fence it.

(1) The Public Health Acts Amendment Act, 1907, s. 30, enacts: "With respect to the repairing or enclosing of dangerous places the following provisions shall have effect (namely):—

"(1.) If in any situation fronting, adjoining, or abutting on any street or public footpath, any building, wall, fence . . . . or any well, excavation . . . . dam or bank is, for want of sufficient repair, protection, or enclosure dangerous to the persons lawfully using the street or footpath, the local authority may, by notice in writing served upon the owner, require him, within the period specified in the notice and hereinafter in this section referred to as the 'prescribed period,' to repair, remove, protect, or enclose the same so as to prevent any danger therefrom:

"(2.) If, after service of the notice on the owner, he shall neglect to comply with the requirements thereof within the prescribed period, the local authority may cause such works as they think proper to be done for effecting such repair, removal, protection, or enclosure, and the expenses thereof shall be payable by the owner, and may be recovered summarily as a civil debt."

NEVILLE J. 1911

CARSHALTON URBAN COUNCIL v. BURRAGE.

[NEVILLE J. Are the public lawfully using the street if they wander 14 feet off it?]

The evidence shews that in dark nights or foggy weather people might easily go off the road 14 feet and tumble in. People have done it. It is a question of degree, and in the light of events it is a dangerous place. The Act is intended to obviate danger to the public and should be construed liberally, and it is submitted that the edge of the pit on the defendant's land is "in a situation" fronting and adjoining the highway notwithstanding the intervening strip of land. "Adjoining" does not necessarily mean immediately contiguous to, but "near to": *In re Baroness Bateman and Parker's Contract* (1); *Ind, Coope & Co.* v. *Hamblin* (2); *Wakefield Local Board of Health* v. *Lee.* (3) The definition of "adjoining" in Stroud's Judicial Dictionary, 2nd ed. vol. i. p. 39, supports this view. The section contemplates a space between the road and the dangerous place on which to erect a fence to enclose it.

R. Croom-Johnson, for the defendant. The section imposes a liability on the owner and must be construed strictly. The section does not say that the owner of the excavation or bank "or of any part thereof" is to fence, but only the owner of the "excavation or bank," that is, of the whole of the excavation or bank. The defendant is not the owner of this pit or of the edge or bank of it, and the section does not apply to him. But if he is the owner within the section, the excavation or bank is not "in a situation fronting, adjoining, or abutting on" the street, by reason of the intervening strip of land: *Newport Urban Sanitary Authority* v. *Graham* (4); *Lightbound* v. *Higher Bebington Local Board* (5); *Barnett* v. *Covell* (6); Wharton's Law Lexicon, 7th ed. p. 4, "Abuttals"; and some limit must be placed on the words "in any situation." Moreover, admitting that the edge or side of the pit is dangerous when one gets there, the operation of the section is controlled by the words "lawfully using the highway." Children or other persons who stray off the highway, however innocently, on to the defendant's

(1) [1899] 1 Ch. 599.
(2) (1900) 81 L. T. 779.
(3) (1876) 1 Ex. D. 336.
(4) (1882) 9 Q. B. D. 183, 187.
(5) (1885) 16 Q. B. D. 577.
(6) (1904) 90 L. T. 29.

strip of land are trespassers and cannot be said to be "lawfully using the highway," and even in dark nights or foggy weather any person in his senses who stepped off the metalled road on to the grass would know at once that he was not on the highway. Lastly, the plaintiffs have mistaken their remedy. They should have proceeded under s. 31 of the Act, or under the Quarry (Fencing) Act, 1887, and s. 91 of the Public Health Act, 1875.

NEVILLE J. This case raises a peculiar point under s. 30 of the Public Health Acts Amendment Act, 1907. The facts are these, and they are certainly unfortunate for the defendant. He is the owner of a narrow strip of land which adjoins the Banstead Road at Carshalton, and on the northern side of it there is a deep chalk pit. Now, of the whole chalk pit he undoubtedly is not the owner, but I think the evidence shews that the edge of the pit is his. His land has from time to time slipped over and gone into and thus now forms part of the side of the pit, although, as far as can be judged, the original side of the pit was a considerable distance inside its existing edge and beyond his land. Now, the defendant having been served with a notice by the plaintiff council under s. 30 of the Act, and having refused to comply with it, and a fence having been erected on his land by the council, the question is whether that proceeding was lawful on the part of the local authority and whether he can be called on to pay the expense. That depends upon the construction of the section as applied to the facts of the case. I ought to say before I proceed to the consideration of the section that, in my opinion, from the evidence in the case and particularly from the lie of the land and the natural features of the locality, the existence of this pit unfenced from the road is a danger, and, in my opinion, a danger to the persons lawfully using the road or street. I do not think that under the section the mere fact that the children of the locality choose, as they naturally would, to select the most dangerous part of the edge of the pit as a playground would bring the case within the section. Having wilfully left the street for the purpose of playing on the edge of the pit they would not be using the highway. But I think with regard to

NEVILLE J. 1911 CARSHALTON URBAN COUNCIL v. BURRAGE.

the legitimate users of the road that the existence of this pit is an undoubted danger. The highway is for use at all hours of the day and night, and I can well conceive a serious, if not fatal, accident happening there from passengers on the road in dark nights or foggy weather unintentionally getting off it and finding themselves on the edge and over into the pit. Having regard to those facts, I have to consider the construction of s. 30. The words used are somewhat peculiar, because the provision is not in respect of an excavation or bank "fronting, adjoining, or abutting on" any street or public footpath, but of an excavation or bank "in any situation fronting, adjoining, or abutting on" a street or public footpath. I feel some difficulty in knowing what was intended by the Legislature by the introduction of those words "in any situation" at the beginning of the section. "Situation" is a word of exceedingly indefinite limits. An excavation or bank may be said to be situated at one end of the village, or in the village, or in the parish, or in the county, with equal accuracy. There are no definite boundaries to "a situation." You have to consider, in each case, the connection in which the word is used; and here I have to consider what "situation" means in this section. The only reason I can find for the introduction of the word is that the operation of the section should not be limited to cases where the excavation or bank is itself immediately fronting, adjoining, or abutting on the street. In order to find out how to limit the extent of the word "situation" I must look at the other part of the section. There I find that it only refers to excavations or banks which are in want of protection or enclosure and are dangerous to persons lawfully using the street or public footpath. It seems to me, therefore, that what I have to consider is whether the matter complained of is so approximate to the street as to form a danger to the persons who are lawfully using it. Therefore, when an excavation is dangerous in character, if the danger is sufficiently near the street to involve danger to the lawful users of the street, you get something which is included in the section. In the present case, having regard to the finding of facts which I have referred to, I am of opinion that the local authority were justified in serving their notice,

and, inasmuch as the notice was disregarded, in erecting the fence. Therefore they are entitled to the injunction asked for, and the defendant must pay the costs of the action.

Solicitors: *A. H. Dabbs & Son; J. W. Reid.*

H. L. F.

BURGHES *v.* ATTORNEY-GENERAL.

[1910 B. 3558.]

Revenue—Valuation of Land—Form 8—Ultra vires—Requisition as to Payment or Receipt of Rent in particular District without specifying Land—Return to be made to Valuation Officer—Threat of Penalty for Non-compliance—Relief against Crown—Declaratory Judgment—Attorney-General Defendant—Action—Rules of Supreme Court, 1883, *Order XXV, r.* 5; *Orde LXVIII r.* 1—*Finance* (1909-1910) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 26, 31.

By s. 31, sub-s. 1, of the Finance (1909-1910) Act, 1910, "Every person who pays rent in respect of any land, and every person who as agent for another person receives any rent in respect of any land, shall, on being required by the Commissioners, furnish to them within thirty days the name and address of the person to whom he pays rent or on behalf of whom he receives rent, as the case may be":—

Held, that the Commissioners of Inland Revenue were not entitled under the above sub-section to require the information in question as to any land by reference to a particular district or generally, but that their powers were confined to requiring such information in reference to particular land to be specified by them in their notice.

Held, also, that the expression "any land" in the sub-section had the same meaning as the expressions "land" and "the land" in s. 26 of the Act, namely, a particular piece of land under separate occupation as to which the special information mentioned in the demand for information was required.

On August 26, 1910, the plaintiff, who was a collector of rents, received through the post a notice with a form indorsed, the notice being marked and the whole document being commonly known as "Form 8," signed by one F. Atterbury, as secretary to the Commissioners of Inland Revenue. The notice was dated August 25, 1910, and by its terms required the plaintiff to make certain returns to a person therein named, and described as "land valuation officer," in respect of persons to whom he paid rent or on behalf of whom he, as agent, received any rent, and also to give the description and situation of their properties situate in or partly within the parish or place of "Plaistow South." The notice required the return to be made within thirty days from its date under a penalty, in

WARRINGTON J.

1911

BURGHES v. ATTORNEY-GENERAL.

the event of not so doing, not exceeding 50*l*. The notice and form were issued by the direction of the Commissioners of Inland Revenue under the provisions of the Finance (1909-1910) Act, 1910. The plaintiff did not fill up and return the form within the thirty days from the date of the notice, and he received a further document dated September 30, 1910, marked and known as "Form 14—Land," requesting him to complete and return the form previously sent. He did not comply with this further request.

On October 25, 1910, the plaintiff issued his writ in the action for a declaration that the form was illegal, unauthorized, and ultra vires, and that he was not under any obligation to comply with its requisitions or any of them:—

Held, that the form was unauthorized inasmuch as it did not specify the land in respect of which the information was required, and required the information to be given to a valuation officer and not to the Commissioners themselves.

Held, also, that the Court had jurisdiction under Order XXV., r. 5, to make a binding declaration of right against the Attorney-General as representing the Crown, but that the jurisdiction was discretionary and ought to be exercised with great care and with a due regard to all the circumstances of the case.

Held, further, upon the facts, that the case was one in which the discretion should be exercised in favour of the plaintiff by declaring that the form was unauthorized and that he was not under any obligation to comply with the requisitions therein contained or any of them.

Dyson v. *Attorney-General* [1911] 1 K. B. 410, followed.

Grand Junction Waterworks Co. v. *Hampton Urban Council* [1898] 2 Ch. 331, distinguished.

By Order LXVIII., r. 1, "Subject to the provisions of this Order, nothing in these rules, save as expressly provided, shall affect the procedure or practice in any of the following causes or matters: . . . . (*c*) Proceedings on the Revenue side of the King's Bench Division . . . .":—

Held, that the Order referred only to the procedure and practice in the several causes and matters therein mentioned, and that the present cause or matter was not one of those to which the Order referred, but was governed by the ordinary rules of procedure and practice of which Order XXV., r. 5, was one.

WITNESS ACTION.

This action was brought by George Harry Burghes against the Attorney-General for a declaration that a certain form issued by the Commissioners of Inland Revenue under the Finance (1909-1910) Act, 1910, and commonly known as Form 8, was illegal, unauthorized, and ultra vires, and that he was not under any obligation to comply with the requisitions of the form or any of them.

The plaintiff was the secretary and manager of the New Century Estates, Limited, having an address at 16 Eastcheap, E.C., and a collector of rents, and in particular he received as agent for the owner the rents payable in respect of land in the borough of West Ham.

On or about August 26, 1910, the plaintiff received through the post a notice and/or form in the following terms :—

The Commissioners of Inland Revenue.	*Reference :* to be quoted in all communications.
	Plaistow South
	7756

DUTIES ON LAND VALUES.

NOTICE TO FURNISH INFORMATION.

Inland Revenue,
Somerset House,
London, W.C.
25 August, 1910.

To Mr. G. H. Burghes,
16, Eastcheap, E.C.

Sir,

With reference to the provisions of the Finance (1909-10) Act, 1910, I am directed by the Commissioners of Inland Revenue to require you to furnish **within thirty days from this date,** (I.) the name and address of every person to whom you pay rent in respect of any land situate within, or partly within, the parish or place of Plaistow South, and (II.) the name and address of every person on behalf of whom you, as agent, receive any rent in respect of any land situate within, or partly within, the aforesaid parish or place.

The expression "land" includes all buildings and other structures thereon, and all minerals on, in, or under the surface of the land.

Forms are provided on the other side in which the required information should be inserted. When completed, the returns

WARRINGTON J.
1911
BURGHES v. ATTORNEY-GENERAL.

should be forwarded in the accompanying franked envelope to the appointed officer,

N. G. Anstey,
521, Barking Road, Plaistow,
London, E.
Land Valuation Officer.

Any person who is required to furnish the information specified above and wilfully fails to do so within the time limited in this notice, is liable to a penalty not exceeding £50.

I am, Sir,
Your obedient servant,
F. Atterbury,
Secretary.

FORM 8.—LAND.

[Indorsed] **I.—Form to be filled up by every person who pays rent in respect of any land within the aforesaid parish or place.**

Note.—If you do not pay rent in respect of any land you should insert the word "NIL" on this form, and sign the declaration below. It is not sufficient to leave this space blank.

Names of persons to whom rent is paid.	Addresses of persons to whom rent is paid.	Descriptions and precise situations of the lands in respect of which rent is paid.

II.—Form to be filled up by every person who as agent for another person receives any rent in respect of any land within the aforesaid parish or place.

Note.—If you do not receive any rent as agent for another person you should insert the word "NIL" on this form, and

sign the declaration below. It is not sufficient to leave this space blank.

Names of persons on whose behalf rent is received.	Addresses of persons on whose behalf rent is received.	Descriptions and precise situations of the lands in respect of which rent is received.

I hereby declare that the foregoing particulars are in every respect fully and truly stated to the best of my judgment and belief.

Dated this _____ day of _____, 191 .

_____ Signature.

_____ Address.

The plaintiff did not fill up and return the form as required by the notice within thirty days of its date.

On or about September 30, 1910, the plaintiff received through the post a "reminder" (Form 14—Land) which was in the following terms:—

Reference
7756
Plaistow South

Inland Revenue,
Somerset House, W. C.,
30th September, 1910.

Mr. Burghes,
16, Eastcheap, E.C.

Sir,

I have to request that you will, without further delay, complete and return to the appointed officer,

N. G. Anstey,
521, Barking Road, Plaistow,
London, E.,
Land Valuation Officer,

the form sent to you requiring you to furnish information as to the names and addresses of any persons to whom you pay rent, or for whom you, as agent, receive rent.

WARRINGTON J.

1911

BURGHES v. ATTORNEY-GENERAL.

I beg to point out that any person who wilfully fails to make the prescribed returns is liable to a penalty not exceeding £50.

This reminder is issued as a matter of courtesy only and not of right, and is without prejudice to any action that may be taken by the Commissioners in consequence of any failure to make returns in due time.

I am, Sir,

Your obedient servant,

F. Atterbury,

Secretary.

The plaintiff did not comply with this request.

On October 25, 1910, he issued his writ in the present action.

By his statement of claim the plaintiff alleged that the notice and/or form was illegal, unauthorized, and ultra vires, and in particular (*a*) that the Commissioners had no power by the terms of the Finance (1909–1910) Act, 1910, to require the plaintiff to fill up the form, or any part of it, giving all or any of the information; (*b*) that the plaintiff was required under the requisitions in the notice and/or form to give the names and addresses of persons in respect of land not specifically named or otherwise sufficiently indicated, which said information he could not be required to give under the provisions of the Act; and (*c*) that the plaintiff was required under the requisitions in the notice and/or form aforesaid to supply information which he could not be required to supply under the Act, and further that the information was not such as it was in his power to supply within the meaning of the Act. He further alleged that the Commissioners had threatened to enforce a penalty for not making such return.

In the further particulars delivered by the plaintiff he objected (1.) that he was required by the notice or form to furnish the required information to "one N. G. Anstey, of 521, Barking Road, Plaistow," which he could not be required to do under the provisions of the Act; and (2.) that he was required by the requisitions to sign the form, and fill in the word "nil" if he did not pay rent in respect of any land, or receive it as agent for another person, which he could not be required to do under the provisions of the Act.

It appeared from the evidence that the land in respect of which the information was required, though situate in the borough of West Ham, happened also to be situate in that portion of the borough which, for the purposes of income tax, was a parish as defined by the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), and as such was called Plaistow South, but that this designation was not for any other purpose the legal name of the district.

Danckwerts, K.C., and *W. Allen*, for the plaintiff. The question in this case arises on the construction of s. 31 of the Finance (1909-1910) Act, 1910 (1), which empowers the Commissioners of Inland Revenue to require every person who pays rent in respect of any land, and every person who as agent for another person receives rent in respect of any land, under a penalty of 50*l.* for default, to furnish to them within thirty days the name and address of the person to whom he pays rent or on behalf of whom he receives rent, as the case may be. In purported exercise of this power the Commissioners served on the plaintiff a form known as Form 8 to be filled up, which it is submitted is unauthorized in the following respects. (1.) It does not specify the particular land in respect of which the information is required; (2.) it requires the information to be given to a valuation officer and not to the Commissioners themselves; (3.) the date of its delivery to the plaintiff did not admit of thirty days being allowed for compliance with the request; and (4.) it referred to land situate within or partly within the parish or place of Plaistow South and there is no such parish or place. The form, therefore, being unauthorized, the plaintiff was under no obligation to fill it up as required, and was liable to no penalty for not doing so.

Dyson v. *Attorney-General* (2) shews that the present action against the Attorney-General is maintainable, and that a declaration may in a proper case be made by the Court under Order xxv., r. 5. The present case is, it is submitted, one in which the Court ought in the exercise of its judicial discretion to make the declarations asked for by the plaintiff. [They also

(1) See note on p. 157, post.

(2) [1911] 1 K. B. 410.

WARRINGTON J.
1911
BURGHES v. ATTORNEY-GENERAL.

referred to *Browne* v. *Black* (1); Finance (1909-1910) Act, 1910, ss. 1, 2, 13, 16, 20, 22, 23 (2.), 25, 26.]

Sir Rufus D. Isaacs, A.-G., Sir J. A. Simon, S.-G., S. A. T. Rowlatt, and *Austen-Cartmell,* for the defendant. After the decision in *Dyson* v. *Attorney-General* (2) we admit that in this Court it is not open to us to contend that this action will not lie. But assuming that the Attorney-General is a proper party, it is submitted that the plaintiff has not established any cause of action. The plaintiff's claim is for a declaration, and that raises the question whether there is any other remedy available to him. Whether or not the Court ought to make a declaration is a matter of discretion to be exercised with extreme care. Here there has been no ground made out upon which the Court can make the declaration, and further than that there has been no ground made out upon which the Court ought to do so.

The plaintiff bases his case (1.) on the illegality of the notice or form and (2.) on an alleged threat of proceedings to enforce compliance. It is submitted, first, that there was no illegality in the notice or form, and, secondly, that there has been at present no threat made or proved.

[WARRINGTON J. There was no threat except what was contained in the notice and the reminder.]

The notice contains nothing more than a repetition of the statutory obligation. Sect. 31, sub-s. 3, imposes a penalty only on a person who "wilfully" fails to comply with the provisions of the section. A person would not "wilfully" fail to make a return merely because he did not make it within the time limited.

The notice, following the terms of s. 31, sub-s. 1, directs the plaintiff to furnish the names and addresses of persons to whom he pays rent or on behalf of whom he receives rent. The object of that section is to enable the Commissioners to obtain the names and addresses of persons for the purpose of obtaining from them the information they were empowered to require under s. 26, sub-s. 2. The Commissioners asked in effect who were the plaintiff's principals and what were their addresses, and

(1) [1911] W. N. 68, since reported [1911] 1 K. B. 975.
(2) [1911] 1 K. B. 410.

that question was one which they were entitled to ask. They were not bound under s. 31 to specify the particular land in respect of which they asked the information. The notice would have been good if it had asked the plaintiff to give the names and addresses of any persons to whom he paid or for whom he received rent in respect of any land.

As regards the plaintiff's objection that there is no such "parish or place" as Plaistow South, that is covered by what we have already submitted. It was contended by the plaintiff that every time the Commissioners sent out notices of this character they were bound to specify the property in respect of which the information was required, but there is no justification for that contention in the Act. It is not what is said or intended by the Act. All that the Act requires as a condition precedent to the information being required is that the person to whom the notice is sent should be paying or receiving rent. To hold otherwise would lead to all sorts of absurdities. It would amount to this, that every person who received a notice with a wrong description of his property would have a right of action against the Attorney-General. This would be to revolutionize the whole form of legal procedure.

The fact that the form was indorsed on the notice did not render it obligatory on the part of the person to whom it was sent to fill up all the three columns with the information required. This is made perfectly clear by the "reminder" of September 30, 1910, which shews that the obligation is confined to filling up the first two columns, namely, those for the names and addresses. The Commissioners were under no obligation to issue a form, and the plaintiff was under no obligation to give the information in a form. The information could have been given by him in a letter.

The objection as to the non-allowance of the thirty days is a mere afterthought on the part of the plaintiff.

The objection that the plaintiff was required to make the return to a valuation officer and not to the Commissioners themselves is a wholly unreasonable one. What the plaintiff is saying is that if the Commissioners, instead of requiring the return to be made to them personally, require it to be made to one of the persons

WARRINGTON J.
1911
BURGHES v. ATTORNEY-GENERAL.

employed by them, whose duty it is to tabulate the information, that is an illegal act. There is no substance in that objection.

Then as to the alleged threat, the notice merely gives a reference to the statute, and as every one is presumed to know the law there can be no cause of action arising out of that.

What then is the precise nature of the complaint made in this case? It is founded on some alleged tortious act on the part of the Crown. But it is an extraordinary contention that that should constitute a cause of action upon which to sue the Crown. To sue an individual official for an illegal act committed by him is one thing, but to sue the Attorney-General as representing the Crown in respect of an act alleged to have been done contrary to law and of which he had no personal knowledge is quite another. It is submitted that the Crown cannot be sued, and that the Attorney-General cannot be sued as a defendant as representing the Crown. There is nothing in *Dyson* v. *Attorney-General* (1) which is inconsistent with this contention. It was never intended that Order xxv., r. 5, should have the extraordinary result contended for by the plaintiff. That Order contemplates the existence of some proprietary right in the plaintiff as against the defendant, and in the cases decided on that rule that right has existed: *Offin* v. *Rochford Rural Council* (2); *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (3); *Jenkins* v. *Price* (4); *Evans* v. *Levy* (5); *Chapman* v. *Michaelson.* (6) Here there is no right upon which to found a claim against the Attorney-General in respect of which a binding declaration can be made.

The Attorney-General is not responsible for what the Commissioners may do. They may threaten to impose penalties, but it rests with the Attorney-General to decide whether or not he will proceed to enforce them. An information for the purpose of enforcing penalties cannot proceed without his consent.

In the present case it is difficult to see what right there is in respect of which a declaratory order can be made. There is merely a possibility that at some future date proceedings may be taken against the plaintiff.

(1) [1911] 1 K. B. 410.
(2) [1906] 1 Ch. 342, 357.
(3) [1906] 1 Ch. 324, 328.
(4) [1907] 2 Ch. 229, 235.
(5) [1910] 1 Ch. 452, 457.
(6) [1909] 1 Ch. 238.

It is admitted that there may be cases in which a declaratory order may properly be made against the Attorney-General, but they are cases in which some proprietary right is involved: see *Hodge* v. *Attorney-General* (1) and cases relied on in *Dyson* v. *Attorney-General.* (2)

[WARRINGTON J. In *Hodge* v. *Attorney-General* (1) the proceedings could not have been brought by petition of right in any case.]

In any event, even if there is jurisdiction in the Court to make the declaration, the Court ought not in the exercise of its discretion to make it in the present case. The jurisdiction is one which ought to be exercised with great care, and a declaration ought only to be made if in the interests of justice it is required. Here it does not follow that proceedings will be taken against the plaintiff, and even if they are he will have every opportunity of raising his objections by way of defence. There is no foundation for the assertion that the plaintiff is in fear that anything will be done by the Commissioners. The action is, it is submitted, misconceived and ought to be dismissed. [They also referred to *Deare* v. *Attorney-General.* (3)]

Danckwerts, K.C., in reply. I admit that the making of a declaration is a matter for the exercise of judicial discretion. The object of the Act of 1910 was to tax specific land for particular duties—increment value duty, reversion duty, undeveloped land duty, and mineral rights duty. The duty of the Commissioners is to value the land for the purposes of those duties. A valuation is useless except with regard to specific land. The clear meaning of s. 26, sub-s. 1, is that every piece of land which is separately occupied, and any part of any land separately occupied, if the owner requires it, is to be separately valued. By s. 27, sub-s. 1, the Commissioners are to cause a copy of their provisional valuation of "any land" to be served on the owner of the land. "Any land" there must mean specific land. By s. 29, sub-s. 1, any duty under Part I. of the Act may be assessed on or in respect of "any such pieces of land whether under separate occupation or not, as the Commissioners think fit." The words "any land" in s. 31, sub-s. 1, have the same meaning as "land"

(1) (1839) 3 Y. & C. Ex. 342. (2) [1911] 1 K. B. 410.
(3) (1835) 1 Y. & C. Ex. 197, 208.

WARRINGTON J.
1911
BURGHES v. ATTORNEY-GENERAL.

in s. 26, namely, the particular piece of separately occupied land which they are to value for the purposes of the duties. The Commissioners are not entitled under s. 31 to say to a person on paying or receiving rent, "Do you pay any rent, or do you receive any rent as agent? If so, tell us the name of the person to whom you pay or for whom you receive it." In making this inquiry they must specify the land. Then, having obtained an answer, they can go to the person to whom according to their information the rent is paid, or for whom it is received, and make inquiries, under s. 26, sub-s. 2, of that person. To obtain the names and addresses of persons to whom rent is paid or for whom it is received without reference to a particular piece or pieces of land would put the Commissioners in no better position than they were in before. The plaintiff does not base his action on "threat." The action would lie equally whether there was or was not a threat, and a fortiori if there was one. His case is that he is not bound to give the information required by the notice because the statute does not require him to do so. The notice and form go beyond the statute and are in that sense illegal and unauthorized. The contention of the Attorney-General that the Commissioners are entitled under s. 31 to require names and addresses generally without reference to particular land is ill-founded.

The objection of the plaintiff that he was required to make the return to a valuation officer instead of to the Commissioners, though small in one sense, is a serious grievance. The Commissioners are entitled to say that they will accept returns made to a particular officer as if made to themselves. The subject is entitled to avail himself of that liberty, but is not bound to do so, and cannot be sued for penalties if he does not.

Under Order xxv., r. 5, the Court is entitled to make a binding declaration of right notwithstanding that no cause of action exists: *Barraclough* v. *Brown* (1); *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2); *Chapman* v. *Michaelson* (3); *Cope* v. *Crossingham* (4);

(1) [1897] A. C. 615, 623.
(2) [1892] 3 Ch. 242, 259.
(3) [1908] 2 Ch. 612; [1909] 1 Ch. 238.
(4) [1908] 2 Ch. 624, 636; [1909] 2 Ch. 148.

Young v. *Ashley Gardens Properties, Ld.* (1); *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (2)

The present case is one to be dealt with in the ordinary manner and by this Court: *Monckton* v. *Attorney-General* (3); *Kirk* v. *Reg.* (4); *Ryves* v. *Duke of Wellington* (5); *Reg.* v. *Prosser* (6); *Clayton* v. *Attorney-General.* (7)

Sir Rufus D. Isaacs, A.-G., in reply upon the cases, referred to *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (8) and Order LXVIII., rr. 1, 2.

Cur. adv. vult.

May 9. WARRINGTON J. The plaintiff in August last received from the Commissioners of Inland Revenue a notice requiring certain information for the purpose of the valuation of land prescribed by the Finance (1909-10) Act, 1910. He has instituted this action against the Attorney-General as representing the Crown, and he claims a declaration that the notice is illegal, unauthorized, and ultra vires, and that he is not under any obligation to comply with it. He claims no other relief. The questions for the decision of the Court are—(1.) whether the notice is open to the objection raised to it by the plaintiff; (2.) if so, is the declaration claimed one that can be made in this action; and (3.) if it can be made, ought it under the circumstances of this case to be made, the making of such a declaration being a matter in the discretion of the Court?

The plaintiff is a collector of rents, and in particular he receives as agent for the owner the rent payable in respect of certain land in the borough of West Ham. This land happens also to be situate in that portion of the borough which, for the purposes of income tax, is a parish as defined by the Taxes Management Act, 1880, and, as such, is called Plaistow South. The designation "Plaistow South" is not for any other purpose the legal name of the district.

The notice received by the plaintiff is known as "Form 8—

(1) [1903] 2 Ch. 112.
(2) (1904) 9 Com. Cas. 289.
(3) (1850) 2 Mac. & G. 402, 412.
(4) (1872) L. R. 14 Eq. 558, 563.
(5) (1846) 9 Beav. 579, 600.
(6) (1848) 11 Beav. 306.
(7) (1834) 1 C. P. Coop. temp. Cott. 97.
(8) [1898] 2 Ch. 331.

WARRINGTON J.
1911
BURGHES v. ATTORNEY-GENERAL.

Land," and is in the following terms: [His Lordship read the notice and the indorsed form, and continued.] The plaintiff did not fill up and return the form within thirty days from the date of the notice, and he received a further document, "Form 14—Land," which is in the following terms: [His Lordship read the "reminder" of September 30, and continued.] He did not comply with this further request, and on October 25 he issued his writ in this action.

The plaintiff says that the notice I have read is not within the authority conferred by the Act under which it purports to be given, first, because it asks for the names and addresses of the persons on whose behalf the plaintiff receives rent in respect of any land in the district mentioned, whereas the Commissioners are (he says) only entitled to require that information in respect of particular land to be specifically mentioned in the notice; secondly, because it in effect requires him to state in respect of what land he receives rent, this demand being unauthorized; thirdly, it requires him to give the information, not (as provided by the Act) to the Commissioners, but to the land valuation officer; fourthly, if the notice were otherwise justified, the description "Plaistow South" is not a proper description of the locality. He further says that, inasmuch as the form was sent through the post and was not received by him until August 26, he did not have the full statutory period of thirty days for compliance, and is on that ground not liable for penalties even if the notice was in other respects proper.

With regard to this last point, I think I must hold on the evidence that he did not receive the form until August 26, and therefore did not have the full thirty days; but, inasmuch as the writ was not issued until October 25, long after the period had elapsed, I should not on this ground alone have held the plaintiff entitled to the declaration he asks. I propose to say no more about this point.

In order to determine whether the notice exceeds the statutory authority it is first necessary to ascertain what it requires the recipient to do—in other words, what is its true construction. I think it ought to be read as having the meaning which it would convey to the ordinary person receiving it. Much importance

ought not, I think, to be attributed to the precise forms of expression or to minute details. Read in this way, I think the notice clearly means that in order to comply with it the forms "on the other side" must be filled in as thereby directed. I cannot accept the contention that the forms are indorsed on the notice merely as a suggestion which the recipient may or may not adopt as to the mode in which the return is to be made. Further, I come to the same conclusion as to the person to whom the return should be sent when completed. If this is so, then the reference to the penalty intimates that the recipient of the notice, if he fails to furnish any of the information, whether mentioned in the notice or in the form, renders himself liable to a penalty.

Is the notice so read within the statutory authority under which it affects to be given? This authority is conferred by s. 31 of the Finance (1909-10) Act, 1910. Omitting sub-s. 2, which is immaterial, the section is in the following terms: [His Lordship read sub-ss. 1 and 3, and continued.] It is plain on the terms of the section, and was, indeed, admitted by the Attorney-General in argument, that the section confers no authority on the Commissioners to require the person in question to give the description and precise situation of the land, namely, the information required to be inserted in the third column of the form. I have already held that the filling up of that column is intended to be imperative. In this respect, therefore, at all events the notice exceeds the statutory authority, and this would be sufficient to enable the Court to answer the first question in the plaintiff's favour.

But as the matter has been much discussed, I think it desirable to consider the wider question whether the Commissioners are entitled to require the information in question as to any land, whether by reference to a particular district or generally, or whether their powers are confined to requiring such information in reference to particular land to be pointed out by them. For the purpose of answering this question I think it is immaterial that the requisition is in the particular case restricted to land in a specified district. If this requisition is good in the sense of being authorized by statute, then it seems to me that one in general terms would be equally good. Sect. 26 of the Act requires

WARRINGTON J.

1911

BURGHES v. ATTORNEY-GENERAL.

the Commissioners to cause a valuation to be made of all land in the United Kingdom, and each piece of land in separate occupation is to be separately valued. Those provisions are in sub-s. 1. Sub-s. 2 is as follows: [His Lordship read the sub-section, and continued.] Among the many particulars which the owner is required to give, the description and situation of the land are not included. This points to the conclusion that the information is required in reference to a particular piece of land about to be valued, the description of which is for purposes of identification sufficiently indicated to the person from whom the information is required. In my opinion, therefore, the land referred to in s. 26 means a particular parcel of land the subject of valuation. Sect. 31 is obviously intended to enable the Commissioners to get the name and address of the owner for the purpose of addressing to him a demand for information under s. 26. In my opinion the expression "any land" in s. 31 has the same meaning as the expressions "land" and "the land" in s. 26, namely, a particular piece of land as to which the special information there mentioned is required. I am of opinion, therefore, that in this respect also the form is unauthorized.

As to the person to whom the return is to be made, I think the Commissioners have no right to require the plaintiff to send the return to any one but themselves, though they might permit him so to do. He was, in my opinion, entitled to assume from the terms of the notice that they would regard a return to any one but the land valuation officer as not being a compliance with it. The "reminder" of September 30 is quite clear on this point, inasmuch as it requests that the return be made to the appointed officer, and points out that wilful failure to make the prescribed return may involve a penalty of 50*l*. In this matter also the Commissioners exceeded their authority.

For these reasons, and in the above-mentioned respects, the notice in question was, in my opinion, not authorized by the statute, and accordingly the plaintiff might refuse to comply with it without incurring the penalty mentioned in it.

I do not attribute any importance to the description "Plaistow South." In my opinion, if the notice had been otherwise justified, the district in reference to which information was

required was sufficiently identified. If this objection had stood alone, I should not have held the notice to have been unauthorized.

The next question is, Has the Court power in this action to make the declaration claimed by the plaintiff? The plaintiff's claim is based on Order xxv., r. 5, which provides that "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." Of course in order that the plaintiff may obtain the benefit of this provision his action must be brought against the proper party. The action here is brought against the Attorney-General as representing the Crown, and it is the Crown and its officers whom it is sought to bind by the declaration. That the Attorney-General as representing the Crown may properly be made defendant to such an action is decided by the Court of Appeal in *Dyson* v. *Attorney-General*. (1) It is true that the question in that case was whether the action should be summarily dismissed under Order xxv., r. 4, but in my opinion, for the purpose of determining this question, the Court of Appeal intended to decide, and did decide, the point to which I have referred. The plaintiff's action, then, is properly constituted as to parties.

It still remains to be considered whether the circumstances are such that the Court is enabled to make a binding declaration. It is contended that there is no cause of action against the Crown or its officers, that they have broken no contract and have done the plaintiff no legal wrong, nor do they threaten to do so. But Order xxv., r. 5, is intended to deal with the very case—that is, one in which no relief can be claimed either by way of damages for the past or an injunction for the future, and, in fact, in several cases declarations have been made under this Order where there was no cause of action in the proper sense. I refer to cases of which *Jenkins* v. *Price* (2) is an example.

But it is said that in order to found a declaration there must be at least some legal relation between the parties in reference to the subject-matter from which a cause of action may arise,

(1) [1911] 1 K. B. 410. (2) [1907] 2 Ch. 229.

WARRINGTON J.
1911
BURGHES v. ATTORNEY-GENERAL.

and there can be none such here. In my opinion this contention is not well founded. The Order itself lays down no limit to the class of cases to which it applies, and I see no reason why the Court should hold that a case in which the Crown is a defendant is impliedly excepted. But even if my opinion were different, I think this point also is covered by the authority of *Dyson* v. *Attorney-General* (1), particularly the remarks of the Master of the Rolls and of Farwell L.J. I am of opinion, therefore, that the Court has jurisdiction to make the declaration.

But the jurisdiction is discretionary, and should be exercised with great care and after due regard to all the circumstances of the case. The question here is one between a subject and the Crown. It affects not only the individual, but numbers of other people. The complaint is that officers of the Crown are demanding information they are not entitled to, and, to say the least of it, reminding the subject of unpleasant consequences which may ensue if it is refused. It seems to me immaterial whether the terms of the notice amount to an actual threat; the reference to the penalty is plainly intended to intimate to the plaintiff that compliance can, and will, be compelled if necessary. If the question be not decided in this way it must be left open until the plaintiff, having refused to comply, is sued for penalties, and the plaintiff would be left in a position of great perplexity. In my opinion, the mode adopted by the plaintiff for obtaining a decision is a very convenient one, enabling the Commissioners to be informed how far they may go, and relieving the plaintiff from the doubt and perplexity into which he has been cast. For these reasons I think the case is one in which the discretion should be exercised in the plaintiff's favour.

There is one point remaining to be noticed. In *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (2) it was held that where the Legislature has provided a special tribunal for the decision of a question this Court ought not, except in very special cases, to interfere by injunction or declaration of right, and thus withdraw the case from that tribunal. The Attorney-General contends that the principle upon which Stirling J. acted in that case applies to the present. In this

(1) [1911] 1 K. B. 410, 417, 421, 422.

(2) [1898] 2 Ch. 331.

case, however, there is no special tribunal appointed for the decision of the question raised by the plaintiff. If the Attorney-General were to sue for the penalty, the proceedings would be in this Court, namely, the High Court of Justice, on the Revenue side of the King's Bench Division, it is true, but none the less in this Court. For this reason the decision I have referred to does not, in my opinion, apply to the circumstances of the present case. Moreover in truth the decision lays down no such principle as is contended for. The learned judge did no more than hold that the circumstance of there being a special tribunal was one which ought to strongly influence the Court against exercising its discretion in the plaintiff's favour.

The Attorney-General also referred to Order LXVIII., r. 1, which is as follows: "Subject to the provisions of this Order, nothing in these rules, save as expressly provided, shall affect the procedure or practice in any of the following causes or matters," and those causes or matters include proceedings on the Revenue side of the King's Bench Division. The answer, in my judgment, is that Order LXVIII. refers only to the procedure and practice in the several causes and matters therein mentioned. The present cause or matter is not one of those to which Order LXVIII. refers, but is governed by the ordinary rules as to procedure and practice of which Order XXV., r. 5, is one.

I propose to declare that the notice in the statement of claim mentioned is unauthorized, and that the plaintiff was not, and is not, under any obligation to comply with the requisitions contained therein or any of them. As at present advised I do not think the plaintiff could recover costs against the Attorney-General. He does not ask for them, and I need not further discuss this matter. There will be no order as to costs. I think that it is better to use merely the word "unauthorized," not "illegal, unauthorized, and ultra vires." There will be judgment in that form.

Solicitors: *Wood & Sons; Solicitor of Inland Revenue.*

NOTE.—Finance (1909-1910) Act, 1910, s. 26: "(1.) The Commissioners shall, as soon as may be after the passing of this Act, cause a valuation to be made of all land in the United Kingdom, showing separately the total value

WARRINGTON J.

1911

BURGHES v. ATTORNEY-GENERAL.

and the site value respectively of the land, and in the case of agricultural land the value of the land for agricultural purposes where that value is different from the site value. Each piece of land which is under separate occupation, and, if the owner so requires, any part of any land which is under separate occupation, shall be separately valued, and the value shall be estimated as on the thirtieth day of April nineteen hundred and nine.

"(2.) Any owner of land and any person receiving rent in respect of any land shall, on being required by notice from the Commissioners, furnish to the Commissioners a return containing such particulars as the Commissioners may require as to the rent received by him, and as to the ownership, tenure, area, character, and use of the land, and the consideration given on any previous sale or lease of the land, and any other matters which may properly be required for the purpose of the valuation of the land, and which it is in his power to give, and, if any owner of land or person receiving any rent in respect of the land is required by the Commissioners to make a return under this section, and fails to make such a return within the time, not being less than thirty days, specified in the notice requiring a return, he shall be liable to a penalty not exceeding fifty pounds to be recoverable in the High Court . . . . "

Sect. 31: "(1.) Every person who pays rent in respect of any land, and every person who as agent for another person receives any rent in respect of any land, shall, on being required by the Commissioners, furnish to them within thirty days the name and address of the person to whom he pays rent or on behalf of whom he receives rent, as the case may be."

"(3.) If any person wilfully fails to comply with the provisions of this section, he shall be liable to a penalty not exceeding fifty pounds to be recoverable in the High Court.

"(4.) Any notice requiring a return for the purpose of valuation, any copy of a provisional valuation, and any other notice or document which is required to be given or sent to an owner or a person interested in land under this Part of this Act by the Commissioners shall be sufficiently given or sent if sent by post to the address of the owner or person interested furnished to the Commissioners under the powers given by this section, or, if the address cannot be so ascertained, by leaving the notice or a copy of the document addressed to the owner or person interested with some occupier of the land, or, if there is no occupier, by causing it to be put up in some conspicuous place on the land."

W. I. C.

SOLOMON *v.* ATTENBOROUGH.

JOYCE J.

1911

May 10, 11, 20.

[1908 S. 54.]

Executor — Administration — Right to pledge Personal Chattels — Pledge by Executor many Years after Death of Testator — Payment of Debts — Realization and Distribution of Assets.

A testator, who died in 1878, by his will, after appointing two executors and giving certain pecuniary legacies, gave his residuary estate to his executors upon trust for sale and distribution as therein mentioned. In 1892 one of the executors, without the knowledge of his co-executor, pawned certain plate of the testator's with the defendants, who had no notice that he was not the true owner thereof, and he misapplied the money advanced upon it to his own purposes. At the date of the pledge all the testator's legacies and debts so far as they were known had been paid, but the residuary estate had not been completely realized or distributed. On the death of the pledgor an action was brought by his co-executor and a new trustee to recover the plate :—

Held, that the pledgor had not at the time of the pledge ceased to be executor, that his right to pledge still existed, and that the defendants were entitled to the plate subject to redemption.

TRIAL OF ACTION.

This was an action by the trustees of the will of Moses Solomon to recover from the defendants, who were pawnbrokers, certain articles of plate, forming (as alleged by the plaintiffs) part of the testator's estate, which had been pledged with them in 1892 by A. A. Solomon, one of the executors, now deceased.

The testator by his will, dated March 20, 1878, appointed the plaintiff Julien Davis Solomon and his brother A. A. Solomon to be his executors and trustees and devised and bequeathed to them his residuary estate, including the articles in question, upon trust to sell the same, and upon further trust to divide the proceeds as therein mentioned. The testator died on March 20, 1878, and his will was proved by the two executors. A. A. Solomon died in 1907, and the plaintiff Chadwick was appointed a trustee of the will jointly with J. D. Solomon. After the death of A. A. Solomon pawn-tickets were found amongst his effects shewing that in 1892 he had pledged the articles in question with the defendants to secure an advance of 65*l.*, upon

JOYCE J. 1911 SOLOMON v. ATTENBOROUGH.

which interest was paid by him to the defendants down to the time of his death. In January, 1908, the plaintiffs discovered that the articles had been so pledged, and the defendants having threatened that unless the pledge was redeemed they would proceed to sell the articles, this action was brought for their recovery.

The plaintiffs alleged that the pledge was wrongfully made without the knowledge or consent of the plaintiff J. D. Solomon and that the money raised was not applied for any purpose of administration, but was misapplied by A. A. Solomon for his own purposes.

The defendants pleaded that if the articles in question formed part of the testator's estate A. A. Solomon was rightfully in possession of them as executor and entitled to pledge the same. It was not alleged or suggested that they had notice of any right, title, or equity affecting the title of A. A. Solomon to pledge the articles, and they claimed to hold them (subject to redemption) as bona fide purchasers for value without notice of any adverse claim, title, or equity. It appeared that at the date of the pledge all the debts and funeral and testamentary expenses of the testator had been paid, but the beneficiaries had not yet received all their shares in the estate, and an action by originating summons was pending in relation to the estate in which leave had been given to the present plaintiffs to bring this action for recovery of the plate.

Cozens-Hardy, for the plaintiffs. When A. A. Solomon pledged these articles in 1892 he did it as trustee and not as executor. As executor he was then functus officio so far as the residuary estate was concerned, and had become trustee: *In re Smith* (1); *In re Timmis*. (2) Being one of two trustees who were joint owners he could not confer a good title to the entirety.

Even assuming that he was sole trustee he could give no greater title than he rightfully had: *Hoare* v. *Parker* (3); *Hooper* v. *Ramsbottom*. (4) Where "the bailor has no title, the bailee can have none, for the bailor can give no better title than he has": *Wilson* v. *Anderton* (5); Story on Bailments, 9th ed. p. 112. The

(1) (1889) 42 Ch. D. 302.
(2) [1902] 1 Ch. 176.
(3) (1788) 2 T. R. 376.
(4) (1814) 4 Camp. 121.
(5) (1830) 1 B. & Ad. 450, 456.

trustee was not the "true owner" within the meaning of the general rule as stated by Lord Herschell in *London Joint Stock Bank* v. *Simmons*. (1)

Hoare v. *Parker* (2) is directly in point, for there the tenant for life pledged plate and it was held that the pawnbroker, who had no notice of the settlement, had no lien on the plate after the death of the tenant for life. There the possession and property of the tenant for life were both lawful, but the property just as in the case of a trustee was a limited property.

Singer Manufacturing Co. v. *Clark* (3) shews that the Pawnbrokers Act, 1872, does not affect the common law rights of an owner of property pledged against his will.

The analogous cases under the Factors Acts shew that a man must act rightfully if he is to confer a good title. Outside the scope of the Acts there is no authority to bind. In *Biggs* v. *Evans* (4) the agent had no authority to sell at all, and the defendant was not protected by the Factors Act then in force, and so in *Lamb* v. *Attenborough* (5) a pledge by a servant did not bind his master's goods, the relationship of master and servant not coming within the Factors Act. *Brocklesby* v. *Temperance Permanent Building Society* (6) was a different case, for there there was authority to pledge but the authority was exceeded, and it was also a case of negligence and estoppel. In all these cases it was admitted that if the Factors Acts did not apply the principal would not be bound where the authority was exceeded. Knowledge by the pledgee of the real position of the pledgor is not material for the purposes of the Factors Acts: *Oppenheimer* v. *Attenborough & Son*. (7)

Hughes, K.C., and *Cann*, for the defendants. One executor can pledge any chattels belonging to his testator, and a pledge by him is none the less good even though the pledgee does not know that he is executor or other than the absolute owner: Williams on Executors, 10th ed. p. 701; and it does not make any difference that the testator has been dead a long time: *In re*

(1) [1892] A. C. 201, 215.
(2) 2 T. R. 376.
(3) (1879) 5 Ex. D. 37.
(4) [1894] 1 Q. B. 88.
(5) (1862) 8 Jur. (N.S.) 280.
(6) [1895] A. C. 173.
(7) [1908] 1 K. B. 221.

JOYCE J. 1911

SOLOMON v. ATTENBOROUGH.

Tanqueray-Willaume and Landau (1); *In re Whistler* (2); *In re Venn and Furze's Contract.* (3)

There is no limit to the time within which an executor may deal with the personal chattels of his testator. His authority is much greater than that of a mere trustee for sale. It would be impossible for business to go on if when dealing with an executor a purchaser should be compelled to inquire into title. In the case of dealing with shares it is never done. There are stronger reasons for it not being done in the case of chattels.

A third party cannot know when the estate has been cleared. Creditors can always resort to the residuary estate for the payment of debts which may come up after distribution.

There is nothing in *In re Smith* (4) to suggest that the executor there had ceased to be an executor, even as to any particular asset. The question there was whether the executor held the residuary estate in trust for an infant within s. 43 of the Conveyancing Act, the point being maintenance. In *In re Timmis* (5) the point was as to the Statute of Limitations, the question being whether there was an express trust.

A pledge by an executor is deemed to be made by him in pursuance of his duty, and it is not incumbent upon the lender to see to the application of the money. The pledge in this case was perfectly good and the plaintiff can only recover the property by paying what has been advanced upon it: *M'Leod* v. *Drummond* (6); *Scott* v. *Tyler.* (7)

Cozens-Hardy in reply. The real point in this case is whether A. A. Solomon was or was not such an owner of the goods as that the ordinary rules as to pledges applied. It is immaterial whether the defendants thought that he was an executor or not. Because he remained an executor it does not follow that he could for an unlimited time exercise with respect to these goods the powers of an executor. After the estate was cleared the assets were held by the executors as trustees, and one of two trustees cannot give a title to a purchaser.

(1) (1882) 20 Ch. D. 465.
(2) (1887) 35 Ch. D. 561.
(3) [1894] 2 Ch. 101.
(4) 42 Ch. D. 302.
(5) [1902] 1 Ch. 176.
(6) (1807) 14 Ves. 353.
(7) (1788) 2 Bro. C. C. 431; 2 Dick. 712, 724.

As an executor A. A. Solomon in 1892 was functus officio and could give no title as the pledgor of a chattel. There was a trust for sale and no authority to pledge. The pledge therefore was an unlawful dealing with the property.

In the case of a sale, no doubt, different considerations arise to those applicable to the case of a contract of pawn: *Hartop* v. *Hoare* (1); *Cundy* v. *Lindsay*. (2) In *London Joint Stock Bank* v. *Simmons* (3) Lord Herschell summarizes the law as to the acquisition of title by a person who has obtained the property of another from one who is dealing with it without the authority of the true owner. A. A. Solomon had no such property in the plate as that he was the true owner within the rule of law there laid down. He could give no good charge on the property without the concurrence of the plaintiffs.

Cur. adv. vult.

May 20. JOYCE J. Moses Solomon, the testator, died on March 20, 1878. This is an action by the trustees of his will, one being an original executor and trustee, against Messrs. Attenborough to recover certain plate of the testator's pawned with them in the year 1892 by Alfred Abraham Solomon, one of the original executors and trustees, and now deceased, upon whose death the pawn-tickets were found among his effects. The money advanced was not used for any purpose of administration, but was misapplied by Alfred Abraham Solomon in paying a private debt of his own to his brother and co-executor, the plaintiff Julien Davis Solomon. There is no imputation or suggestion of negligence or want of good faith against Messrs. Attenborough. The transaction was one entered into by them in the ordinary course of their business, and they were not affected with notice of any kind of the articles pawned not being the absolute property of Alfred Abraham Solomon.

It is elementary that the executors of a testator, or any of them, may sell or pledge any part of the personal estate, and in making any disposition thereof must be presumed to be acting in the due discharge of their duties, unless there be something in the

(1) (1743) 3 Atk. 44, 52. (2) (1878) 3 App. Cas. 459.
(3) [1892] A. C. 215.

JOYCE J. 1911 SOLOMON v. ATTENBOROUGH.

transaction itself to shew the contrary. By the will in this case the testator, after appointing executors, gave certain pecuniary legacies, and as to the rest and residue of the real and personal estate of whatsoever kind he devised and bequeathed the same to his executors upon trust to sell the same within two years after his decease, and to divide the proceeds of sale as in the will mentioned. It is said, and is probably true, that long before this transaction of pawning in 1892 all the debts and liabilities of the testator so far as they were known to the executors had been paid or discharged, and while it is not denied that the transaction in question, if it had taken place within a few years after the testator's death, would have been perfectly good and binding upon the estate, it is contended that before 1892, the fourteenth year from the testator's death, Alfred Abraham Solomon had in the circumstances become a joint trustee with his brother the plaintiff Julien Davis Solomon of these articles of plate, and that his power as an executor to sell or pledge them had determined. As a matter of fact, if I rightly understand, the testator's residuary estate has not even now been distributed or even completely realized, and some proceedings are now pending with respect to the administration of the testator's estate, this action having been brought by the direction or with the leave of the judge or Master in those proceedings.

It is quite true that for many purposes an executor in certain circumstances is or is deemed to be or become a trustee, but an executor does not cease to be executor as soon as the debts, pecuniary legacies, and funeral and testamentary expenses are paid or discharged, especially if the residue be not ascertained and distributed. So far as concerns personal estate not previously alienated and excluding chattels comprised in a specific bequest to which the executor has assented an executor may sell, mortgage, or pledge any part of it, even after twenty years, and if he does so will be presumed to be acting in the exercise of the duties imposed upon him by the will, so that the purchaser or mortgagee or other assignee will be under no liability to creditors or legatees: see *In re Whistler* (1); *In re*

(1) 35 Ch. D. 561.

Venn and Furze's Contract. (1) These cases in my opinion shew that there is no limit to the period of time during which an executor may exercise his ordinary power to sell or pledge. Nor is there anything really at variance with this in the case of *In re Verrell's Contract* (2) or any of the other cases to which I have been referred.

The result is that this action fails and must be dismissed with the usual consequences.

Solicitors: *Cox & Lafone; Stanley J. Attenborough.*

G. A. S.

In re PEEL'S SETTLEMENT. BIDDULPH *v.* PEEL.

[1911 P. 373.]

Power of Appointment—Special Power by Will or Deed—Appointment by Will among all Objects equally—Subsequent Appointments by Deed to two of several Objects—Ademption—Rule against Double Portions.

By his will, dated in 1869, a testator, who had a power under the settlement upon his first marriage to appoint certain funds in favour of all and every one or more of his children, grandchildren, or other issue by any marriage, appointed the same equally among all the children of his second marriage who should be living at his death. There were seven children, all of whom survived him. By two deeds executed respectively in 1897 and 1901 he appointed a seventh share of the settled funds to each of two of these children. He died in 1910:—

Held, that the rule against double portions applied, and that consequently the children to whom appointments had been made by deed were not entitled to any further share under the will.

By an indenture of settlement dated May 23, 1857, made on the first marriage of Archibald Peel, certain property was settled upon trust to pay the income thereof to the said A. Peel during his life, and after his death upon trust for any single child, grandchild, or other issue if there should be but one object of the power now in statement, but if more than one, then for all and every one or more of the children, grandchildren, or other issue of the said A. Peel (whether by his then intended wife or

(1) [1894] 2 Ch. 113, 114. (2) [1903] 1 Ch. 65.

JOYCE J. 1911 PEEL'S SETTLEMENT, *In re.* BIDDULPH *v.* PEEL.

any other wife or wives), such grandchildren or other issue to be born during his life as he should, either by way of portion or annuity, by any deed or deeds or by his will or any codicil thereto direct or appoint, and in default of such appointment in trust for all and every the children and child of the said intended marriage who should be living at the decease of the said A. Peel as therein mentioned. Of this marriage there were three children. The wife died in 1863.

In 1867 A. Peel married again, and by his second wife he had seven children.

By his will dated in 1869, after reciting the settlement and the power therein contained and that his children by his first marriage were amply provided for, he appointed the settled funds to be equally divided between and among all and every his child and children by his second wife who should be living at his decease.

By a codicil dated in 1908 he appointed that the share in the settled fund of his son Alfred J. R. Peel, who had died during the testator's lifetime, should be paid to his son's widow for the benefit of their son Archibald J. R. Peel.

By a deed poll dated in 1897 the said A. Peel irrevocably appointed one equal seventh part or share of the settled funds to be held in trust for his daughter Fanny Peel, who was then about to be married, and who by a settlement executed upon her marriage settled the share so appointed.

By another deed poll dated in 1901 the said A. Peel appointed one equal seventh part or share of the settled funds in trust for his son Edward J. R. Peel, who was then about to be married, and who also settled his appointed share.

A. Peel died on August 9, 1910.

This was an originating summons taken out by the trustees of the settlement of 1857 for the determination of the questions (1.) whether the effect of the will of A. Peel and the deeds poll of 1897 and 1901 was to appoint the property subject to the trusts of the settlement to the seven children of the second marriage in equal shares, and, if not, in what other shares and proportions, and (2.) whether the codicil to the will of the said A. Peel was a valid appointment to Archibald J. R. Peel of the

share appointed to his father by the said will contingently on his father surviving the said A. Peel.

Percy Wheeler, for the plaintiffs.

W. A. Peck, for the four children to whom no appointment was made by deed. The intention of the testator was to provide equally for all his children by his second wife who should be living at his decease. Fanny and Edward, to whom appointments have been made by deed, are not entitled to any further share. The presumption against double portions applies. If the property had been the testator's own the question would have been unarguable: *Montague* v. *Montague*. (1) In *In re Ashton* (2) Stirling J. held that a mother was not in loco parentis for the purposes of the application of the rule. On appeal fresh evidence was adduced and the decision was reversed. (3) To permit Fanny and Edward to take further shares would frustrate the intention of the testator that there should be equality. I do not contend that the infant Archibald J. R. Peel does not take his father's share.

C. G. Church, for the trustees of Fanny Peel's settlement. There were special circumstances in *Montague* v. *Montague*. (1) The rule against double portions does not apply here.

T. Pakenham Law, for the trustees of Edward Peel's settlement. In *Montague* v. *Montague* (1) the testator by a codicil expressly said that he intended to place all his children on an equality, and that was the ground of the decision. This case is governed by *In re Ashton*. (2) *In re Tancred's Settlement* (4) was really a case of election, but Buckley J. states there what he thought was held by Stirling J. in *In re Ashton*. (2) There is no reason why the rule should apply in the case of an appointment under a power.

N. C. Armitage, for the infant Archibald J. R. Peel. On principle the rule against double portions applies to the case of an appointment under a special power just as much as to a disposition by a testator of his own property: *Pym* v. *Lockyer*. (5)

(1) (1852) 15 Beav. 565.
(2) [1897] 2 Ch. 574.
(3) [1898] 1 Ch. 142.
(4) [1903] 1 Ch. 715.
(5) (1841) 5 My. & Cr. 29, 46.

JOYCE J. 1911

PEEL'S SETTLEMENT, *In re.* BIDDULPH *v.* PEEL.

[Theobald on Wills, 7th ed. p. 767, and Jarman on Wills, 6th ed. p. 854, were also referred to.]

Cur. adv. vult.

June 2. JOYCE J. In this case a settlement was made on the first marriage of Archibald Peel whereby it was provided that the settled fund after the death of Mr. Peel should be held on trust (speaking broadly) for such of his children or issue by any marriage to be born during his lifetime as he should by deed or will appoint, and the power of appointment is expressed to be subject to such conditions in favour of one or more and either by way of portion or of annuity as Mr. Peel should by will or deed appoint. Then in default of appointment the fund is to be in trust for the children of that marriage as mentioned in the will. By the first marriage the settlor had three children. Nothing was appointed to them, as it was considered that they were sufficiently provided for from other sources.

Mr. Peel married again in 1867, and there were seven children of that marriage. Afterwards to two of the children of that marriage Mr. Peel made appointments by deed, one in 1897 to Fanny Peel on her marriage, and another in 1901 to Edward Peel on his marriage, the appointment in each case being of one seventh of the fund and subject to Mr. Peel's own life interest.

On August 9, 1910, Mr. Peel died, and left a will dated in 1869, within two years after his second marriage, by which will, after stating that his children by his first marriage were amply provided for, he appointed the settled fund to be equally divided between and among all and every his children by his second wife who should be living at his decease. By a codicil, dated in 1908, after the death of a son, one of the seven children of the second marriage, he appointed that the share in the settled fund of his son who had died should be paid to his son's widow for the benefit of their son.

The question has now arisen how the five sevenths of the fund remaining after taking away the two sevenths that were appointed by the two deeds already mentioned ought to be divided. It is contended on the one hand that the five sevenths ought to be divided among all the children, i.e., in seven shares. On the

other hand it is contended that it should be divided among the four children and the child of the deceased child who took nothing under any appointment by deed. Any ordinary layman would say that Fanny and Edward having already each had their one seventh ought not to participate in any further division. I think an experienced lawyer would intuitively say the same thing, though he might not perhaps at the moment be able to give the best reason for his opinion, and I have now to consider what is the sound legal reason to be given for what in this case might almost be called the conclusion of common sense.

In the first place the words of the will interpreted literally are that the whole fund shall be divided equally between the seven children of the second marriage, which would not be the case if Fanny and Edward were to take further shares. I may mention in passing that s. 24 of the Wills Act (as to the will speaking from the death) does not appear to me to apply, the contrary being sufficiently indicated in the will, though s. 23 would, I think, apply if necessary.

Now it is said that if the fund had been the father's own property, or if the power had been a general power, beyond all question the presumption against double portions would have applied upon the principle thus stated by Lord Selborne L.C. in *In re Pollock* (1): "When a testator gives a legacy to a child, or to any other person towards whom he has taken on himself parental obligations, and afterwards makes a gift or enters into a binding contract in his lifetime in favour of the same legatee, then (unless there be distinctions between the nature and conditions of the two gifts, of a kind not in this case material) there is a presumption prima facie that both gifts were made to fulfil the same natural or moral obligation of providing for the legatee; and consequently that the gift inter vivos is either wholly or in part a substitution for, or an 'ademption' of the legacy. This presumption has in some cases of that class (see particularly *Hopwood* v. *Hopwood* (2)) been carried to a great length." For this rule various reasons, some not very satisfactory, are given in the books, but it is well settled, whether, as Lindley L.J. has said, we like it or not.

(1) (1885) 28 Ch. D. 552, 555. (2) (1859) 7 H. L. C. 728.

JOYCE J. 1911 — PEEL'S SETTLEMENT, *In re.* BIDDULPH v. PEEL.

But I must observe that the fund here is in a very different position from property which the father could dispose of as he pleased. It is a fund provided and set apart for the purpose of making provision, after the death of the parent, for the issue of Mr. Archibald Peel. Strictly speaking the fund was not the father's at all at the date of the appointment. It belonged to the objects of the power or to those taking in default of appointment, subject to the father's power of selection and division, that is, his power to specify by which of the objects of the power and in what proportions it shall be taken. In popular language the sums appointed by deed, as also those bequeathed by the will, are portions, and I find that they are portions properly so called in legal language. In *Jones* v. *Maggs* (1) Turner V.-C. said: "Portions for children are, I think, generally understood to be sums of money secured to them out of property springing from or settled upon their parents; and although there may, no doubt, be cases in which provisions for children out of property in which the parents take no interest may well be called portions, I think that such provisions would only receive that designation where the nature or context of the instrument gives them that character." So again in *In re Stephens* (2) Buckley J. said: "Now the meaning of the word 'portion,' as generally understood, is a sum of money secured to a child out of property either coming from or settled upon its parents. The benefit is none the less a portion because it is given to all the children, including the eldest child, and not to younger children only."

In *Montague* v. *Montague* (3), which was cited to me, the circumstances were very complicated and the case was by no means so clear as the present. There in 1842, a parent, having a power to appoint two separate sums of 5000*l.* and 10,000*l.* amongst his children, made his will, by which he appointed the 5000*l.* to James and the 10,000*l.* equally between Theodosia and Catherine. In 1844 he, by deed, appointed the 5000*l.*, which he had before appointed to James, to Theodosia. In 1846 he, by codicil, confirmed his will, and he died in 1847. Theodosia claimed two sums of 5000*l.*, but James contended, first, that she

(1) (1852) 9 Hare, 605, 607.
(2) [1904] 1 Ch. 322, 327.
(3) 15 Beav. 565.

was bound by election to give effect to the bequest of 5000*l.* to him, or to relinquish the 5000*l.* given her by the will; and, secondly, that the appointment by deed of 1844 was a satisfaction of the legacy of 5000*l.* It was held that no case of election had arisen, but that the legacy to Theodosia was satisfied and that the amount which the will purported to appoint to her was in the result unappointed. Romilly M.R. said (1): "I am of opinion that the deed of the 18th October, 1844, must be treated as having satisfied the bequest of 5000*l.* appointed by the will. The presumption is against double portions, and the burthen of proof lies on those who contend that Lady England" (that was Theodosia) "is to take both portions to shew why this presumption is, in this case, to be rebutted."

This decision has never been overruled or expressly disapproved. In fact I think it has been approved. In *In re Ashton* (2), which was reversed on appeal upon new and additional evidence (3), a lady who had a special power to appoint a fund amongst her children, grandchildren, or other issue, in exercise of the power by her will directed the trustees to divide the fund equally between her three children. By irrevocable deed poll executed after the will she appointed a third of the fund to one of her children. It was held by Stirling J. that the rule against double portions did not apply, and that the child to whom the appointment was made by deed was entitled to share equally with the other children under the will. It is to be observed that there, though not stated in the marginal note, the fund was a legacy bequeathed by the grandfather to his daughter for life and then for the children as she should appoint. Stirling J. held as he did principally on the ground that the person who exercised the special power was not the father but the mother. And speaking of *Montague* v. *Montague* (4) he says (5): "In *Montague* v. *Montague* (4) the rule against double portions was held applicable to appointments made in exercise of a special power. It appears, however, that the appointor was the father of the appointees, and that the

(1) 15 Beav. 572.
(2) [1897] 2 Ch. 574.
(3) [1898] 1 Ch. 142.
(4) 15 Beav. 565.
(5) [1897] 2 Ch. 579.

JOYCE J. 1911 — PEEL'S SETTLEMENT, *In re.* BIDDULPH *v.* PEEL.

appointed funds consisted of sums made chargeable by way of portions for younger children on estates settled by himself on his marriage. The appointed funds were, therefore, 'portions' in the strictest sense."

In my opinion Stirling J. would have said precisely the same thing with regard to the sums appointed and bequeathed in this case. He would, I think, have said that they were portions. I have no doubt that in the present case the sums appointed are portions in the strictest sense for the purpose of applying the rule or presumption against double portions, and in truth it is the very case to which that presumption primarily and most fitly and properly applies.

There will, therefore, be a declaration that the shares appointed by the will to Fanny and Edward were adeemed by the appointments made to them by deed, what remains being now divisible into five shares, one of which, being validly appointed by the codicil, goes to the child of the son who predeceased the testator.

Solicitors: *Eardley Holt, Lightly & Co.; Evans, Wadham & Co.*

G. A. S.

GREAT CENTRAL RAILWAY COMPANY *v.* MIDLAND RAILWAY COMPANY.

NEVILLE J.

1911

April 26, 27; *May* 10.

[1908 G. 2076.]

Railway Company—Running Powers over another Line—General Traffic—Railway Junction by third Company for limited Traffic—Amalgamation of Running Company with Junction Railway—Effect of Amalgamation—Railways Clauses Act, 1863 (26 & 27 *Vict. c.* 92), *ss.* 38, 39, 41, 55.

Under a special Act of 1865 the plaintiff company obtained general running powers over the defendant company's M. to W. line. In 1897 the Derbyshire Railway Company, whose line crossed the defendant company's said line at S., constructed under the powers of a special Act a short line (called the S. curve) and a junction connecting their line with the defendant company's said line at S., and, under an agreement with the defendant company, were granted running powers over so much of the defendant company's line as lay between the junction and a colliery on the defendant company's line for coal traffic to and from the colliery by way of the S. curve and junction.

In 1906 the plaintiff company and the Derbyshire Railway Company were amalgamated under a special Act which incorporated the amalgamation provisions of the Railways Clauses Act, 1863, and the Derbyshire Railway Company was dissolved. The plaintiff company then claimed that, as owners of the Derbyshire Railway Company's undertaking, they were entitled to bring general traffic over the S. curve and junction and then, by virtue of their general running powers under the Act of 1865, to pass such traffic over the defendant company's line to and from M. The defendant company insisted that under ss. 38 and 39 of the Railways Clauses Act, 1863, the plaintiff company's right to use the S. curve and junction was limited to such rights as were possessed by the Derbyshire Railway Company at the time of the amalgamation:—

Held, that where one railway company has general running powers over the line of another railway company, the running company may exercise their powers at any point at which they can get lawful access to the owning company's line in the absence of express prohibition or agreement to the contrary.

Held, therefore, that as the plaintiff company had under the Act of 1906 acquired a lawful right of access by means of the S. curve and junction to the defendant company's line at the junction, they were entitled to exercise the right they claimed.

The principle of *Midland Ry. Co.* v. *Great Western Ry. Co.* (1873) L. R. 8 Ch. 841, applied.

ACTION.

This was an action in which the plaintiff company claimed

NEVILLE J. 1911 GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY.

the right to run their trains for all purposes between that part of their railway which was formerly known as the Lancashire, Derbyshire and East Coast Railway (hereafter called the "Derbyshire Railway" and coloured blue on the plan herewith) and the defendant company's Mansfield and Shireoaks line (coloured green on the same plan) by way of the short line known as the Shirebrook curve shewn on the plan.

In 1865 both the plaintiff company (then the Manchester, Sheffield and Lincolnshire Railway Company) and the defendant company promoted Bills in Parliament for railways between Mansfield, Shireoaks, and Worksop, and it was arranged between them that the plaintiff company should drop their Bill and that clauses should be inserted in the defendant company's Bill giving them running powers over the defendant company's proposed new line between Shireoaks Junction and Mansfield, the defendant company in return having running powers over the plaintiff company's line between Shireoaks and Retford. Accordingly the Midland Railway (Mansfield, &c., Lines) Act, 1865, was passed and enacted :—

Sect. 29. "The company (i.e. the defendant company) shall permit the Manchester Sheffield and Lincolnshire Railway Company to pass over and use with their engines and carriages and servants, and for the purposes of traffic of all kinds, the portion of the railway of the company by this Act authorised between Worksop or Shireoaks and Mansfield (being railways Nos. 4 and 5) and the stations, sidings, watering places, buildings and appurtenances, works and conveniences belonging to or connected with the said portion of railway and stations respectively, and the stations at Mansfield of the company and the works and conveniences connected therewith, and the Manchester Sheffield and Lincolnshire Railway Company shall in like manner permit the company to pass over and use with their engines and carriages and servants, and for the purposes of traffic of all kinds, so much of the Manchester Sheffield and Lincolnshire Railway as lies between the junctions of the line hereby authorised with the Manchester Sheffield and Lincolnshire Railway Company's railway at Worksop or Shireoaks and the termination thereof at Retford, and the stations, sidings and

From Sheffield
Beighton
Waleswood
Killamarsh
Upperthorpe & Killamarsh
Kiveton Park
BRANTCLIFFE NORTH JUNCTIONS
WEST
EAST
Shireoaks Stn.
SHIREOAKS JUNCTIONS
WEST
EAST
SOUTH
Worksop
To Retford
Eckington
Eckington & Renishaw
Eckington
Staveley Town
Clowne
Cresswell for Welbeck
Whitwell
Elmstead & Creswell
Creswell Colliery
Langwith Colliery
From Chesterfield
Arkwright Town
Bolsover
Langwith Junction Station
Langwith
LANGWITH JUNCTIONS
Warsop Main Colliery
WARSOP MAIN JUNC.
Scarcliffe
SHIREBROOK JUNCTION
Shirebrook Station
Shirebrook Colliery
Warsop
To Lincoln
Edwinstowe
Heath
PLEASLEY EAST JUNCTION
Mansfield Woodhouse
Sherwood Colliery
MANSFIELD
To London
To Alfreton
To Nottingham
ENLARGEMENT AT SHIREBROOK.
Langwith
Langwith Junction Sta
LANGWITH JUNCTIONS
East Junc
Warsop Main Colliery
Branch
G. N. Rly
SHIREBROOK CURVE
WARSOP MAIN JUNC.
SHIREBROOK JUNC
Warsop Main Colliery
Shirebrook Station
REFERENCE.
Great Central Railway. coloured Red
Great Central Railway formerly L.D.& E.C.Rly. coloured Blue
Midland Railway. coloured Green
Great Northern Railway. coloured Yellow

[To face p. 174.

watering places, buildings and appurtenances, works and conveniences belonging to or connected with the said railway and stations respectively at Shireoaks, Worksop and Retford, and the respective companies shall make all requisite arrangements for those purposes, and the fares and rates in respect of such traffic upon the said portion of railway of the company shall from time to time be fixed by the Manchester Sheffield and Lincolnshire Railway, and upon that portion of the Manchester Sheffield and Lincolnshire Railway above mentioned by the Midland Railway Company, and such fares and rates shall in all cases include terminal charges, and shall be the through fares and rates for the same traffic over the lines of the two companies, and the proportion payable to the Midland Company or to the Manchester Sheffield and Lincolnshire Railway Company, as the case may be, shall be a mileage proportion of the through rate, less payments to other companies and the usual clearing house or other terminals, and thirty-three and one-third per centum for working expenses when either of the said companies shall convey their own traffic on or over the railway of the other company or any part thereof: Provided always that neither of the said companies shall be at liberty to take up or carry on the said portion of the line of railway of the other of them any traffic commonly known as local traffic Provided further that such user as aforesaid shall be subject to the byelaws and regulations of the company over whose line the traffic of the other company is worked for the time being."

Under this Act the defendant company's line from Mansfield to Shireoaks Junction (coloured green on the plan) was constructed, and the plaintiff company had since continuously exercised the running powers thus conferred upon them by s. 29 for the purposes of goods and mineral traffic not only for the throughout run to and from Mansfield, but also to and from branch lines and sidings which had from time to time been made to connect the line with collieries (including the Shirebrook Colliery) which had sprung up at various intermediate points, the earnings being divided between the two companies on the scale prescribed by the section; and the defendant company had in like manner exercised their running powers over the plaintiff

NEVILLE J. 1911 GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY.

company's line (coloured red on the plan) between Shireoaks and Worksop and Retford.

By a special Act passed in 1897 the Manchester, Sheffield and Lincolnshire Railway Company was renamed the Great Central Railway Company and became the plaintiff company with its attendant rights and privileges, including the rights and powers conferred by s. 29 of the Act of 1865.

By the Lancashire, Derbyshire and East Coast Railway Act, 1891, the Lancashire, Derbyshire and East Coast Railway Company (hereinafter called "the Derbyshire Company") was incorporated, and shortly afterwards constructed a new line pursuant to the Act from Chesterfield on the east to Edwinstowe on the west (coloured blue on the plan) in a direction running parallel to the main line of the plaintiff company but a few miles to the south of it, and crossing the defendant company's line from Mansfield to Shireoaks Junction near Shirebrook.

Prior to the passing of the Act next stated the Derbyshire Company and the defendant company came to an arrangement whereby the Derbyshire Company were to construct a short line connecting their main line with the defendant company's line at Shirebrook and a new goods station at Mansfield, and were on the completion of these works to have running powers to that town over the defendant company's line. Accordingly by the Lancashire, Derbyshire and East Coast Railway Act, 1897, the Derbyshire Company were authorized to construct, and did construct, the short line known as the Shirebrook curve (shewn on the plan) connecting their main line with the defendant company's Mansfield to Shireoaks line at the point called Shirebrook Junction; and by s. 26 of the Act were empowered to enter into and carry into effect agreements with the defendant company with respect to certain purposes including—

"The working or use management and maintenance of the railway or railways of the Derbyshire Company or of any part thereof.

"The management regulation interchange collection transmission and delivery of traffic upon or coming from or destined for the railways of the contracting companies.

"The fixing subject to the authorised maximum rates

collection payments division and appropriation of the tolls fares rates charges and other income and profits arising from traffic to from and over the railways of the contracting companies or any part or parts thereof."

Shortly afterwards the Derbyshire Company and the defendant company in pursuance of this section, and for the purpose of granting each other running powers over parts of their lines as connected by the Shirebrook Junction and of regulating the traffic in relation thereto, entered into two agreements dated respectively December 1, 1897, and February 1, 1898.

The agreement of December 1, 1897, provided (amongst other things) as follows:—

"1. From and after the opening for public traffic of the proposed Shirebrook Junction the Midland Company may run over and use with their engines, carriages and trucks of every description and with their clerks officers and servants for the purpose of traffic of all descriptions the said Shirebrook Junction and may in like manner run over and use for the purpose of coaching traffic only such part of the Derbyshire Company's railway as lies between the Shirebrook Junction and the Edwinstowe station including that station.

"2. From and after the opening for public traffic of the Shirebrook Junction and the completion of their goods station at Mansfield the Derbyshire Company may run over and use with their engines wagons and trucks of every description with their clerks officers and servants for the purpose of goods and mineral traffic of all descriptions destined to or from their goods station at Mansfield (but not for coaching traffic) such part of the Midland Company's Mansfield and Worksop Railway as lies between the Shirebrook Junction and the proposed junction at Mansfield."

The agreement of February 1, 1898, after reciting the agreement of December 1, 1897, and that the Derbyshire Company were also desirous of obtaining access over the defendant company's Mansfield and Worksop Railway to the Shirebrook Colliery, then in course of development, provided (amongst other things) as follows:—

"1. The Derbyshire Company may, without prejudice to the

NEVILLE J. 1911 GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY.

running powers already given as aforesaid, for the purposes of traffic to and from Shirebrook Colliery run over and use so much of the Midland Company's Mansfield and Worksop Railway as lies between the junction therewith of the Derbyshire Company's Shirebrook branch and the Shirebrook Colliery together with such sidings works and conveniences upon or in connection with such portion of railway as are required for the convenient working of such traffic as aforesaid.

"2. The consideration for the said running powers shall notwithstanding anything contained in the agreement already entered into as aforesaid . . . . be the sum of 3*d.* per ton to be paid by the Derbyshire Company to the Midland Company in respect of all traffic conveyed by the Derbyshire Company to and from the said colliery."

Subsequently by an agreement dated March 24, 1902, to which the same two companies were parties, the toll or sum of 3*d.* a ton payable in respect of traffic to and from Shirebrook Colliery was reduced to 2*d.* per ton. The running powers given to the Derbyshire Company under clause 2 of the agreement of December 1, 1897, never in fact came into actual operation owing to that company's failure to construct a goods station at Mansfield, and they never obtained any running powers over any part of the defendant company's Mansfield and Shireoaks line further or otherwise than in respect of traffic to and from the Shirebrook Colliery as above stated.

By the Great Central and Derbyshire Railways Act, 1906, after reciting (inter alia) that the railways of the Derbyshire Company communicated at several points with the railways of the plaintiff company, and that it was expedient and would be for the public and local advantage that the railways and undertaking of the Derbyshire Company should be transferred to and amalgamated with the undertaking of the plaintiff company, and after incorporating (amongst others) the Railways Clauses Consolidation Act, 1845, and Part V. (relating to amalgamation) of the Railways Clauses Act, 1863, the whole undertaking of the Derbyshire Company was transferred to and vested in the plaintiff company, and the Derbyshire Company was dissolved.

During the proceedings before Parliament which led up to the

passing of the Act of 1906, the defendant company strongly opposed the proposed transfer to the plaintiff company of the undertaking of the Derbyshire Company on the ground (amongst others) that it would enable the plaintiff company to pass their traffic on and off the Mansfield line by way of the Shirebrook Junction, thus depriving the defendant company of their mileage between Shirebrook and Shireoaks. The defendant company, however, ultimately withdrew their opposition upon the terms of an agreement dated June 15, 1906, and made between the plaintiff company and the defendant company and confirmed by s. 10 of the Act. This agreement, which was scheduled to the Act, provided (inter alia) as follows:—

"4. The toll or sum of twopence per ton payable to the Midland Company by the Derbyshire Company under clause 14 of the agreement of March 24, 1902, in respect of traffic to or from the Shirebrook Colliery passing over the Midland line from or to the Derbyshire Company's railway at Shirebrook Junction shall continue to be paid by the Great Central Company upon all their traffic using this route. Provided always that if in any one year commencing on the 1st day of January next after the passing of the intended amalgamation Act or on any subsequent 1st day of January the number of tons carried by the Great Central Company by this route shall exceed the number of tons so carried by the Derbyshire Company in the year 1905 then and for every ton carried in excess of the last-mentioned number of tons the Great Central Company shall pay to the Midland Company the toll or sum of threepence in lieu of the toll or sum of twopence aforesaid."

"15. All routes which are now open for the passage of traffic between the Derbyshire Company's railway and the Midland Company's railway and between the Great Central Company's railway and the Midland Company's railway and which might be affected by the said intended amalgamation shall remain open.

"16. All routes which are now open for the passage of traffic from or to places upon the Derbyshire Company's railway to or from places upon or beyond the Midland Company's railway shall remain open and rates charged for traffic passing by the Midland Company's route shall in all cases be equal to the rates

NEVILLE J. for the time being charged for traffic passing by the Great Central Company's route."

1911

GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY.

Shortly after the passing of the Act of 1906 the plaintiff company adopted the route via Shirebrook Junction for general traffic to and from places on the defendant company's Mansfield and Shireoaks line, and for that purpose ran off and on the defendant company's said line at Shirebrook Junction and passed over and used with the plaintiff company's engines and carriages and trucks the defendant company's said line. The defendant company objected and contended that the running powers of the plaintiff company over the defendant company's Mansfield and Worksop line via the Shirebrook Junction railway were only the same as those previously possessed by the Derbyshire Company, namely, running powers in respect of the traffic to and from the Shirebrook Colliery. Thereupon the plaintiff company brought this action and claimed a declaration that they were entitled to exercise running powers for all their traffic over the defendant company's Mansfield and Worksop line and over any part thereof and for that purpose to run on and off the said line by way of the Shirebrook Junction.

It appeared that, for the purpose of effecting the junction of the Shirebrook curve with the green line, the Derbyshire Company, under the provisions of the Act of 1897 and of an agreement dated July 24, 1899, obtained from the defendant company the grant of an easement "to maintain, work, use and enjoy the junction upon, over and across some 34 perches of land" belonging to the defendant company "nevertheless in all respects subject to and in accordance with the provisions" of the Act of 1897.

It also appeared that besides the running powers which the Derbyshire Company exercised under the agreement of February, 1898, via the Shirebrook curve and junction to and from the Shirebrook Colliery, which was a coal traffic, there was also an exchange of goods traffic at the junction which was not conducted under any running powers, but was merely an exchange of goods in sidings of the Midland Company abutting on the Shirebrook curve. The exchange sidings were connected, and the Derbyshire Company took the trucks into the Midland

sidings and left them there, and then the Midland engines coupled up the trucks and carried them to their destination, and vice versa; but the Derbyshire Company did not at any time use the Shirebrook curve and junction for passenger or coaching traffic.

C. A. Russell, K.C., *Jenkins, K.C.*, and *W. H. Cozens-Hardy*, for the plaintiff company. The plaintiffs as owners of the blue line have the right to run over and use the whole of that line for all purposes, and by virtue of s. 29 of the Act of 1865 have full running powers over the green line from Mansfield to Shireoaks or any part thereof. The plaintiffs therefore having this right to use both lines are entitled by means of those two sets of running powers to pass any kind of traffic either from the blue line to any part of the green line between Mansfield and Shireoaks, or vice versa. The principle of the decision of the Court of Appeal in *Midland Ry. Co.* v. *Great Western Ry. Co.* (1) governs this case. The defendants say that the plaintiffs are restricted in their user of the Shirebrook curve and junction to the same extent that the Derbyshire Company were restricted. But the Act of 1897 and the agreement of February 1, 1898, could not in any way modify the already existing rights of the plaintiffs in respect of the green line, and there is nothing either in the Act of 1906 or the agreement of June 15, 1906, which in any way limits or cuts down the running powers of the plaintiffs over the green line under the Act of 1865. If the defendant company intended that the plaintiff company should not be entitled to run over the green line any traffic which they brought on to it by means of the Shirebrook curve and junction, it was for them to obtain the insertion of a clause to that effect in the Act of 1906. They did not do so, and it is submitted that the powers of the plaintiff company under the Act of 1865 are entirely unaffected by any of the subsequent Acts and agreements. We are not claiming to use the Shirebrook curve and junction by virtue of any running powers of the Derbyshire Company. We are the owners of the Derbyshire undertaking, and it is our traffic that comes over the Shirebrook curve and junction, which we have a legal right

(1) L. R. 8 Ch. 841, 849, 855.

NEVILLE J. 1911 GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY.

to use as a means of access to the green line, and directly we get on to that line we have a right to say "We are the Great Central" and to exercise our running powers over it under the Act of 1865.

Upjohn, *K.C.*, and *Sargant*, for the defendant company. We do not dispute that the plaintiff company have the running powers over the Shirebrook curve that the Derbyshire Company had and subject to the same terms and conditions, except where those terms and conditions have been expressly altered by the agreement of June, 1906; nor do we dispute that in respect of Derbyshire traffic the Shirebrook Junction is to be maintained as an open route for the exchange of traffic in just the same way as was done before the amalgamation of 1906. Our contention is that the plaintiff company is not now entitled to use the junction between the green line and the Shirebrook curve for traffic which is Great Central traffic pure and simple, and which except for the amalgamation would never have come by the Shirebrook curve, but would have come on to the green line by the Shirebrook Junction. We deny that the plaintiff company are entitled to bring on the green line via the Shirebrook curve and junction traffic which the Derbyshire Company were not entitled to carry at all. The case cited is distinguishable. In it the running powers were general, and there was no amalgamation. It is submitted that if in that case the user of the junction had been limited as in this case the decision would have been different, and that this case is really governed by the provisions of the Railways Clauses Act, 1863. Sects. 36 and 37 of that Act are introductory, and then the effect of ss. 38, 39, 41, and 55 is that the powers and authorities of the dissolved company subject to the obligations of that company become vested in the amalgamated company, and are to be held, used, exercised, and enjoyed by the amalgamated company in the same manner and to the same extent as the same were at the time of amalgamation; so that the right of the amalgamated company (the plaintiff company) to use the powers and privileges and the rights and property of the dissolved company (the Derbyshire Company) is measured by the rights and powers of the dissolved company itself. Therefore the effect of the plaintiff company acquiring the undertaking of the

Derbyshire Company under the Act of 1906, which incorporates the Act of 1863, is to put them under restrictions which they were not subject to before, and limits their user of the Shirebrook curve and junction to the user the Derbyshire Company possessed at the time of the amalgamation. The agreement of June, 1906, supports this view. The words "all their traffic using this route" in that agreement mean and are equivalent to "Shirebrook Colliery traffic."

C. A. Russell, K.C., in reply, referred to s. 92 of the Railways Clauses Consolidation Act, 1845.

Cur. adv. vult.

May 10. NEVILLE J. The predecessors of the Great Central Railway Company were by the Midland Railway (Mansfield, &c., Lines) Act, 1865, given running powers over the Midland Railway Company's lines between Mansfield on the south and Shireoaks on the north. In my opinion these powers were exercisable over any part of the line in question although the words "or any part thereof" are not inserted. By the Lancashire, Derbyshire and East Coast Railway Act, 1897, s. 4, sub-s. 2, the Derbyshire Company were authorized to construct a short line known as the Shirebrook curve and to form a junction with the Midland Company's line between Mansfield and Shireoaks, and by s. 26 were given power to enter into agreements with the Midland Railway Company with respect to, inter alia, the regulation of traffic upon the railways of the contracting companies. By an agreement made in the year 1898 between the Midland and Derbyshire Companies the latter were given running powers over the Midland line between the junction and the Shirebrook Collieries subject to a toll of 3*d.* a ton, reduced to 2*d.* a ton by a subsequent agreement entered into in 1902. The Shirebrook Junction was used in connection with these running powers and also for the interchange of traffic between the Derbyshire and Midland Companies. By the Great Central and Derbyshire Railways Act, 1906, the Great Central Company were authorized to acquire the undertaking of the Derbyshire Company, and by clause 4 of an agreement scheduled to this Act provision was made for the continuation of the payment of the

NEVILLE J. 1911 GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY.

toll of 2*d.* in respect of the colliery traffic already mentioned. I will deal with this clause later on. The Act of 1906 does not refer to the running powers of either company over the line of the Midland.

The question which the parties seek to have determined in this action is whether the Great Central Company have the right to come on to the Midland line over the Shirebrook Junction and then exercise their running powers granted in 1865 over the Midland line, or whether their rights to use the junction are limited to such rights as were possessed by the Derbyshire Company. So far as this Court is concerned the question to be determined at the outset is whether the present case can be distinguished from the case of *Midland Ry. Co.* v. *Great Western Ry. Co.* (1) The defendants rely upon ss. 38 et seq. of the Railways Clauses Act of 1863, and upon the provisions of the Act of 1897 taken in connection with the agreements of 1898 and 1902 as differentiating the present case. It becomes necessary, therefore, to consider what the case relied upon did in truth decide. In my opinion the language of the judgments in *Midland Ry. Co.* v. *Great Western Ry. Co.* (1) is free from ambiguity, although some little difficulty arises from the fact that, so far as the report shews, the Midland Company did not as it appears to me rest their case exclusively upon the grounds upon which the Court decided in their favour. I think the Court decided upon a principle of general application, namely, that where one company has general running powers over a line of another company, the running company may exercise their powers at any point at which they can get lawful access to the owning company's line, in the absence of express prohibition or agreement to the contrary. In the case under consideration the Midland Company acquired a right to use the Hereford Company's line (which afforded access by means of a junction to the Great Western Company's line) under an agreement with the Hereford Company which was held to be an agreement within the powers of the Hereford Company. I share the doubt expressed by James L.J. whether the validity of the contract was material, but it does not appear to

(1) L. R. 8 Ch. 841.

me necessary to consider that point further, because in the present case the right which the Great Central Company had to use the Derbyshire Company's line was legally acquired and complete, the only question being how far that right supports their present contention. I will assume therefore that, to bring the case within the decision of the Court now under consideration, access by the running company must be obtained by a binding agreement with the company over whose line the access is obtained. I do not understand the Court to have held that the Hereford Company could transfer any right which it possessed over the Great Western Company's line to the Midland Company, but only that by agreement between the two companies the Midland Company were lawfully entitled to use the Hereford Company's line. True it is that the Court held the junction to be part of that line, but, as Mellish L.J. pointed out, that was of no consequence to any one who had the right to use both lines. Somewhere or other the lines of the two companies joined, and the precise point where the running company ceased to use their powers over the Hereford line and commenced to use their powers over the Great Western line was immaterial. (1) The Midland Company having a legal right to run over the Hereford line and a legal right to run over the Great Western line, the two lines being continuous, they could use these rights in combination. But then it is said that in the Hereford case the rights of the Hereford Company to cross the junction on to the Great Western Company's line were general, whereas in the present case, although the junction was constructed by the Derbyshire Company, they could only shew title to an easement over the Midland Company's line for the purpose of making the junction, and, further, owing to the limited character of their agreement with the Midland Company, they had a limited and not a general right to use the junction as a means of access to the Midland line. In the first place, I cannot myself see how any company can make a junction of its line with that of another company except by virtue of an easement over the land of that company; and, secondly, if the junction be legally put in so as to make the two

(1) See L. R. 8 Ch. 856.

NEVILLE J. 1911 GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY.

lines one continuous railway, it seems to me immaterial to consider what the rights of the two owning companies with regard to the user of one another's line may be. As I understand the decision, the rights of the running company do not depend upon the rights of the two owning companies inter se, but arise from the fact that the running company, having general powers over both lines and finding them legally in connection, can use their powers conjunctively so as to pass from the one to the other: see per Mellish L.J. (1) It is further said that the rights of the amalgamated company are less than would be those of a company having running powers over the dissolved company's line owing to the provisions of the general Act of 1863, which by s. 38 vests in the amalgamated company the rights and powers of the dissolved company only to the same extent as the same might be exercised and enjoyed by the dissolved company. It appears to me, however, that the effect of s. 38 is to give the Great Central Company rights which include the right to carry their traffic over the whole of the Derbyshire Company's system and to put them in at least as good a position as if they had acquired running powers over it. Their rights over the Midland line appear to me to depend upon the Act of 1865 and not upon the former rights of the Derbyshire Company over the Midland line at all, their rights under the Act of 1906 merely affording them the means of access to and so enabling them to exercise their powers over the Midland line at this point.

I will now consider whether and how far the provisions of clause 4 of the agreement of 1906 affect the matter. It is said by the defendants that s. 4 treats the whole of the traffic coming by the Derbyshire route as traffic to the Shirebrook Collieries and consequently indicates that the exercise of no other power than that already possessed by the Derbyshire Company was contemplated. Now, if this were so, I do not think it would amount to a prohibition to the Great Central Company from using any other powers they might have, but I do not think the provisions of clause 4 necessarily bear that construction. At the date of the agreement the Great Central Company had already carried traffic from the collieries by another route. If s. 4 had not been

(1) L. R. 8 Ch. 855.

inserted they would or might have been able to carry traffic by the Derbyshire route to and from the collieries under their old powers without having to resort to any powers vested in the Derbyshire Company. The provisions, therefore, may very well be inserted for the purpose of preventing this and imposing terms which are more onerous than those which the Derbyshire Company were under with regard to colliery traffic carried over the Great Central Company's new route, leaving the existing terms standing with regard to colliery traffic carried over the old route or any traffic other than colliery traffic carried over either route. I think "all their traffic using this route" means traffic to and from the colliery.

In the result, therefore, I hold that the plaintiffs, having a legal right to carry traffic over the Derbyshire line and a legal right to carry traffic over the Midland line, and the two lines being connected by a junction lawfully constructed under the provisions of an Act of Parliament which contains no prohibition with regard to its user, are entitled to use the two lines in conjunction as one continuous line, and I must make the declaration asked for by the plaintiffs, adding the words "subject with regard to traffic to and from the Shirebrook Colliery to the agreement of June 15, 1906." The costs must follow the event.

Solicitors: *Dixon H. Davies; Beale & Co.*

H. L. F.

C. A.
1911
JOYCE J.
March 3, 9, 15.
C. A.
May 23, 24.

ROBINSON *v.* BEACONSFIELD RURAL DISTRICT COUNCIL.

[1911 R. 184.]

Public Body—Negligence—Contract for Discharge of Duty — Liability for Contractor's Negligence—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 42, 45.

The Beaconsfield Rural District Council had undertaken, under powers given to them by the Public Health Act, 1875, the cleansing of cesspools in part of their district. They entered into a contract with H. that he should keep the cesspools clear. The contract did not contain any express provision as to disposal of the sewage matter emptied out of the cesspools. H.'s men had without leave deposited the sewage on the land of the plaintiffs, who brought an action against the council and H. for damages:—

Held, that the council had a duty to dispose of the sewage, and on the construction of the special contract they had not contracted with H. for the discharge of this duty and were still liable for its not being discharged.

Held by Buckley L.J., that even if they had contracted for the discharge of this duty they would have remained liable to the plaintiffs for the contractor's failure to perform the duty.

This was an appeal from a decision of Joyce J. upon a motion for an injunction to restrain the defendant council, their servants, agents, and workmen, from trespassing on the lands of the plaintiffs and from placing or disposing any sewage or other foul matter thereon, and from doing any act thereto which might cause a nuisance to the plaintiffs or their tenants. The plaintiffs were the owners of a building estate at Beaconsfield which was in course of development. Their case was that the defendants had trespassed upon their land and caused a serious nuisance to them and their tenants by depositing upon the land sewage which had been removed by their contractor from cesspools in the district of the defendant council.

The defendant council alleged that pending the carrying out of a drainage scheme for the district, which had been approved by the Local Government Board, they had contracted with the defendant Hook for the cleansing of the cesspools in their district under s. 42 of the Public Health Act, 1875.

The offer of contract was contained in a tender by Hook, dated September 23, 1911, "To horse sewage barrel and trolly two men and two horses hours of work 7 A.M. to 5 P.M. 14*s.* 6*d.* per day, this price to include storage of barrel and trolly and fuel for furnace during year," as explained by a letter from Hook to the council, dated November 18, 1910, in the following terms:—

"Dear Sirs,—In answer to your kind inquiry re sewage barrel and working same with two men I am prepared to carry out the emptying of cesspools as follows, viz. that my two men shall work the barrel alone. I guarantee to keep cesspools clear so that there be no complaint whatsoever under the present amount of cesspools, the council to pay for all repairs also that the men come in at 1 P.M. on Saturdays to give time to do all necessary requirements to the barrel for the coming week." This was accepted by the highways committee of the council, and the report of that committee was approved by the council.

No definite arrangement was made between the parties as to where the sewage removed from the cesspools was to be deposited. The surveyor of the council had forbidden Hook to deposit it where it would be a nuisance, but had given no more precise orders. It was the practice of Hook to arrange with the neighbouring farmers for permission to empty it upon their lands. The plaintiffs alleged that Hook had without their permission deposited some of the sewage upon their lands in close proximity to their tenants' houses, and that this constituted a serious nuisance and injury, and they moved for an injunction accordingly. The defendants not claiming the right to do what was complained of, no injunction was asked for upon the motion, the only question being whether the defendant council were legally responsible for the acts of their contractor and consequently liable in damages. The hearing of the motion was by consent treated as the trial of the action, and came on for hearing before Joyce J. on March 3, 1911.

Younger, K.C., and *F. Baden Fuller*, for the plaintiffs. The defendant council are responsible for the acts of Hook. He was not an independent contractor, and even if he were the council could not escape responsibility for the non-performance of the

C. A. 1911

ROBINSON v. BEACONSFIELD RURAL COUNCIL.

duty which they have undertaken by delegating it to him. It was their duty to provide for the proper disposal of the sewage without causing a nuisance. They are responsible for the failure of Hook to do properly what it was their duty to perform: *Hardaker* v. *Idle District Council* (1); *Penny* v. *Wimbledon Urban Council*. (2)

Hughes, K.C., and *A. J. Spencer*, for the defendants, urged the same arguments as in the Court of Appeal, citing *Jones* v. *Liverpool Corporation* (3) and *Quarman* v. *Burnett*. (4)

March 15. JOYCE J. In this case the urban district council, under s. 42 of the Public Health Act, 1875, undertook or assumed the duty or the work of cleansing earth closets, privies, ashpits, cesspools, and so on, for their district or a part of it; and they employed the co-defendant Hook to cleanse the cesspools, or to remove the filth from certain cesspools in the district. Now it appears to me that the only contract between the district council and Hook is contained in what is called the "tender for carting" for the year ending September 30, 1910, as modified by the letter of November 18, 1910, and the acceptance by the highways and sanitary committee, which had the management of this part of the council's work, as appearing by their minute, and the approval of the report of the committee by the council. Now, looking at these documents, I do not find any express contract for the disposal of the contents of the cesspools after they were removed from the cesspools; and I think that important. It might be a very serious question whether the decision of the Court of Appeal as expressed in the judgment of Lord Cairns in the case of *Pendlebury* v. *Greenhalgh* (5) would not apply to this contract; in other words, whether all they contracted with Hook for was not the carting, or taking the filth out of the cesspools, there being no contract or arrangement whatever as to what should be done with the contents of the cesspools when the cesspools were emptied. As a matter of fact I rather think there had been some talk with

(1) [1896] 1 Q. B. 335, 340, 342.
(2) [1899] 2 Q. B. 72.
(3) (1885) 14 Q. B. D. 890.
(4) (1840) 6 M. & W. 499.
(5) (1875) 1 Q. B. D. 36.

Hook as to what he was to do; but I do not find it in the contract. To my mind, the result of the evidence is that the council made no express contract, and made no provision for the disposal of the contents of the cesspools when they were taken out of the cesspools and placed in the van. It appears to me that the council in doing what they did, or causing to be done the thing which they did cause to be done, became responsible for the keeping or the disposal of the filth removed from the cesspools so as not to create a nuisance or injury to any one. In the view I take of this case, I think they were liable for that; they were responsible for that, whether they contracted with Hook to dispose of the sewage or contents of the cesspools or not.

I think I am following and enforcing the law as laid down by Lindley L.J. in the case of *Hardaker* v. *Idle District Council* (1), in which he cites a judgment of Lord Blackburn. Speaking of the district council, he says: "If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects, as they would be if he were their servant. Such negligence is sometimes called casual or collateral negligence. If, on the other hand, their contractor fails to do what it is their duty to do or get done, their duty is not performed and they are responsible accordingly." Then he says that he will take the law as laid down by Lord Blackburn in *Dalton* v. *Angus* (2), and he quotes the following passage: "Ever since *Quarman* v. *Burnett* (3) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty

(1) [1896] 1 Q. B. 335, 340, 342. (2) (1881) 6 App Cas. 740, 829.
(3) 6 M. & W. 499.

C. A. 1911 ROBINSON v. BEACONSFIELD RURAL COUNCIL. Joyce J.

and stipulate for an indemnity from him if it is not performed; but he cannot thereby relieve himself from liability to those injured by the failure to perform it." Then he cites authorities, and Lindley L.J. continues: "Lord Blackburn in this passage contrasts a contractor's negligence, which he calls 'collateral,' with failure on the part of a contractor to perform the duty of his employer. For the first the employer is not liable; for the second he is, whether the failure is attributable to negligence or not."

I think *Penny* v. *Wimbledon Urban Council* (1) is to the same effect. I observe there—I am not sure that this is absolutely to be relied on—Romer L.J. says: "I desire to point out that accidents arising from what is called casual or collateral negligence cannot be guarded against beforehand, and do not come within the rule." I am not sure that that is necessarily correct. Still, I think the cases all support that view; and it appears to me that here the defendant council took insufficient or no precaution, or made no provision for the disposal of the contents of the cesspools when taken therefrom; in other words, they failed to take reasonable precautions to prevent damage by the work which they set Hook to do. Damage was occasioned by the contents of these cesspools not being disposed of so as not to hurt anybody; and a natural consequence of that appears to be that the plaintiffs have been damaged, and it appears to me that the defendant council are liable; therefore they must pay 5*s*. by way of damages, and the costs of the action.

G. A. S.

C. A.

The defendants appealed. The appeal came on for hearing on May 23, 1911.

Hughes, K.C., and *A. J. Spencer*, for the appellants. There is no connection between the act done by Hook's men and any failure of duty on the part of the council: what has happened was a negligent act by Hook's men, "casual or collateral" negligence as it is called in some of the authorities: for this the council are not liable.

(1) [1899] 2 Q. B. 72, 78.

In order to render a person liable for an act of negligence which he did not himself commit, it must be shewn by the person injured either that the person sought to be made liable authorized the act of negligence complained of, or that it was committed by his servant in the course of his employment, or that he owed such a duty to the person injured that he could not, by delegating its performance to a contractor, rid himself of the duty: *Hardaker* v. *Idle District Council.* (1) *Jones* v. *Liverpool Corporation* (2) is very much the same as the present case, and there the council were held not to be liable for the negligent conduct of the driver of a water-cart who was employed by a contractor.

Quarman v. *Burnett* (3) established the rule that a person who employs an independent contractor to do work for him is not liable for what has been called the collateral negligence of the contractor's servants, though he might be for the negligence of his own servants. The fact that the surveyor had a power of supervision did not make Hook's men servants of the council: *Reedie* v. *London and North Western Ry. Co.* (4) A surveyor cannot be made liable for a contractor's negligence: *Taylor* v. *Greenhalgh.* (5) *Pendlebury* v. *Greenhalgh* (6) was decided the other way because the Court held that the lighting of the road during alteration was a duty thrown on the surveyor. *Steel* v. *South Eastern Ry. Co.* (7) shews that a parol contract is sufficient and that the surveyor of a council is responsible for the thing he orders to be done, not for the contractor's negligent way of doing it. In *Penny* v. *Wimbledon Urban Council* (8) the decision was against the council, but the reasons given do not apply to this case. There danger was likely to arise and there was no casual or collateral negligence. Here there was not only negligence but wilful misfeasance on the part of Hook's men. The putting the sewage on the plaintiffs' land as they did was quite outside the sphere of their duty, and the council would not be liable even if the Court should hold that

(1) [1896] 1 Q. B. 335, 344.
(2) 14 Q. B. D. 890.
(3) 6 M. & W. 499.
(4) (1849) 4 Ex. 244.
(5) (1874) L. R. 9 Q. B. 487.
(6) 1 Q. B. D. 36.
(7) (1855) 16 C. B. 550.
(8) [1899] 2 Q. B. 72.

C. A. 1911 — ROBINSON v. BEACONSFIELD RURAL COUNCIL.

Hook was not an independent contractor but a servant of the council: see judgment of Willes J. in *Murray* v. *Currie* (1), adopted and followed in *Lord Bolingbroke* v. *Swindon Local Board*. (2) The emptying of the barrel is plainly included in the contract to keep the cesspools clear and to work the barrel alone.

Younger, K.C., and *F. Baden Fuller*, for the respondents, were not called upon.

KENNEDY L.J., at the request of the Master of the Rolls, delivered the leading judgment. In this case the appeal is from a judgment of Joyce J., who as regards the present appellants has made an order in the following terms: "And it is ordered that the Urban District Council of Beaconsfield do pay the plaintiffs the balance of their costs of the action after deducting the said 10*l.* paid by the defendant Albert Edward Hook"—Hook had submitted to a perpetual injunction and had agreed to pay 10*l.* towards the plaintiffs' costs of the action—"and also 5*s.* for damages." In my opinion the judgment appealed from was right. No doubt in many of these cases the question of the liability to third persons of a corporate body who have employed a contractor to perform certain duties is on the facts a question which it is not easy to decide, but the principles are, I think, undoubted. In the present case the Act of Parliament is the Public Health Act, 1875, s. 42, which forms part of a group of sections headed "Scavenging and Cleansing." That section says, "Every local authority may, and when required by order of the Local Government Board shall, themselves undertake or contract for—the removal of house refuse from premises; the cleansing of earthclosets privies ashpits and cesspools; either for the whole or any part of their district." Then by s. 45, "Any urban authority may, if they see fit, provide in proper and convenient situations receptacles for the temporary deposit and collection of dust ashes and rubbish; they may also provide fit buildings and places for the deposit of any matters collected by them in pursuance of this part of this Act." This is an urban district council.

In the latter part of the year 1910 this urban district council

(1) (1870) L. R. 6 C. P. 24, 27. (2) (1874) L. R. 9 C. P. 575.

was minded to employ a man named A. E. Hook for a certain purpose, which I will mention directly, as appears from the contract for the cleansing of cesspools within their district. The council had full power to enter into this contract under the sections which I have read. On September 23, 1910, a tender was received from Hook. It was headed "Beaconsfield Urban District Council. Tender for carting for the year ending September 30, 1911," and there were three alternative methods of work included in that contract, the third of which was as follows:—

"To horse sewage barrel and trolly 2 horses and 2 men hours of work as above at per day. This price to include storage of barrel and trolly and fuel for furnace (1) for the year | 14*s.* 6*d.* Fourteen shillings and sixpence per day."

That tender was put into a precise form by a letter of November 18, 1910, signed by Hook and addressed to the council. He there describes himself as "coal and coke merchant, cartage contractor." The letter says: "In answer to your kind inquiry re sewage barrel and working same with two men I am prepared to carry out the work of emptying of cesspools as follows, viz. that my two men shall work the barrel alone. I guarantee to keep cesspools clear so that there be no complaint whatsoever under the present amount of cesspools the council to pay for all repairs also that the men come in at 1 P.M. on Saturdays to give time to do all necessary requirements to the barrel for the coming week."

That was accepted by the council, and under that engagement Hook continued to do work in emptying these cesspools and conveying the contents to the barrel, and on one occasion he emptied the contents of a cesspool, so collected in the barrel, on land of the plaintiffs. The plaintiffs found that on a portion of their property. Hook and his men—I draw no distinction between them—had deposited a quantity of this sewage, and they brought this action complaining of this trespass, and also of the nuisance occasioned to them and their tenants by this act. The question

(1) A furnace for working the machinery of the barrel.

C. A. 1911 ROBINSON v. BEACONSFIELD RURAL COUNCIL. Kennedy L.J.

came before Joyce J. He decided against the defendants as well as against Hook, and as against these defendants he made the order I have read. The question is whether these defendants can be made liable for that which was done by Hook and his servants. In my opinion Joyce J. was right in holding that the action was rightly launched and that upon the facts there was a liability on the corporation in respect of which he awarded compensation against them. These defendants now appeal. It is unnecessary to decide whether even if this contract had contained words including the disposal of the sewage there would not have been a good cause of action against the appellants. There is no doubt that a public body in the position of these defendants have a duty in regard to cleansing which they may undertake either by themselves or by a contractor, and if they do undertake by a contractor I am not going to say that they might not be liable for misfeasance for the act of the contractor whom they choose to employ in the discharge of that duty. But I base my judgment upon this, that in this contract they have themselves retained the duty of disposing of the sewage, and have not in the case of this contract entered into any engagement with Hook for doing that which is the occasion of the present complaint. It is a contract which in its terms provides only for what it says, namely, "the carrying out the work of emptying the cesspools," that is to say, the carrying of the contents of the cesspools into this barrel. It contains no doubt an undertaking by the contractor to keep the cesspools clear, but there is no complaint as to not taking the sewage out of the cesspools, and in respect of the place of deposit the contractor undertakes no duty. It is clear, therefore, that that was a duty which under the contract was of necessity retained by the appellants. Under these circumstances and under this contract they are persons who in respect of the acts of Hook, through himself or through his servants, are under a continuing liability to see that this duty was performed without legal injury to anybody. In fact Hook did deposit a quantity of this noxious stuff upon the land of the plaintiffs. He thereby committed an act which constituted a trespass and which from the nature of the deposit constituted a nuisance also, and there being nothing in the contract which

enabled the appellants to say "You, Hook, undertook to do this disposal work," it is clear to me that they remain liable for that which is a natural and necessary consequence of the removal, namely, that which has been described as the deposit and disposal of the sewage. Hook's work was confined to cartage and removal; the work of disposal remained under this contract with the appellants. They clearly retained the power of directing where the sewage should be deposited and they owed a duty to give those directions clearly.

Cases have been cited which like the present in my opinion depend on the facts, but in my opinion the two cases nearest to the present are the cases relied upon by Joyce J. The language used in the judgments in *Hardaker* v. *Idle District Council* (1) and in the judgments in *Penny* v. *Wimbledon Urban Council* (2) applies to this case. There was in my opinion a clear duty to be performed here in respect of the proper deposit of the sewage, which was not contracted for and the improper performance of which would create a danger to anybody on whose lands this sewage is cast if proper care were not taken for the prevention of a trespass and nuisance by the local council. I base my judgment on the principle I have stated and the application of that principle to the facts of the case. I think that the judgment of Joyce J. was right and that this appeal should be dismissed.

Cozens-Hardy M.R. I agree. In my view the contents of the barrel belonged to the council and not to Hook, and if money were paid by farmers for the stuff, Hook could not have claimed the money.

Buckley L.J. When these defendants undertook the work of cleansing these cesspools they came under a duty. The sewage which was collected became their property, they could sell it, and they became responsible for it. Under s. 45 they had power to find a proper place for depositing it. They owed a duty to use all reasonable skill and care so to dispose of and deposit this sewage as not to injure or cause damage to any person. They were at liberty to employ a contractor to do the work, but if the

(1) [1896] 1 Q. B. 335. (2) [1899] 2 Q. B. 72.

C. A. 1911

ROBINSON v. BEACONSFIELD RURAL COUNCIL.

Buckley L.J.

contractor failed to do that which it was the duty of these defendants to do or get done, then these defendants are liable. In the language of Lord Blackburn in the case of *Dalton* v. *Angus* (1), which is quoted by Lindley L.J. in *Hardaker* v. *Idle District Council* (2), "Ever since *Quarman* v. *Burnett* (3) it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor." Whatever, therefore, were the contents of the contract, I think that on this ground these defendants were liable. They owed a duty of getting rid of this noxious stuff. They have not performed that duty; they are consequently liable. There is a second ground on which they are liable. They had not imposed this duty of the disposal of the sewage on any one. The bargain which Hook entered into was a mere cartage contract. There was first a tender, and to that tender effect was given by a letter of November 18, 1910. That letter contained nothing which required Hook to find a place for the deposit of this sewage. All that he had to do was to collect the sewage. There was no provision in the contract as to where he was to take it. There was nothing whatever in the contract by which he became responsible for the disposal of this sewage. In my opinion, therefore, the local authority had no independent contractor for the purpose of depositing this material in some proper place so as not to injure anybody. On that ground these defendants have not brought themselves within the doctrine as to independent contractors and the responsibility rests with them and they are liable. The appeal will be dismissed with costs.

Solicitors for appellants: *Stow, Preston & Lyttelton, for Charsley & Reynolds, Slough.*

Solicitors for respondents: *Surtees, Phillpotts & Co.*

(1) 6 App. Cas. 740, 829. (2) [1896] 1 Q. B. 335, 342.
(3) 6 M. & W. 499.

J. R. B.

KNILL *v.* DUMERGUE.

C. A.
1911
JOYCE J.
Feb. 22, 23;
April 25, 26.
C. A.
June 28, 30.

[1909 K. 673.]

Indian Civil Servant—Retiring Annuity or Pension—Liability to Assignment or Sequestration—East India Annuity Funds Act, 1874 (37 & 38 *Vict. c.* 12)—*Pensions Act*, 1871 (*India*) (*Act No. XXIII. of* 1871), *ss.* 4, 11, 12.

The East India Annuity Funds Act, 1874, did not terminate the existence of the Civil Annuity Funds therein referred to or make the Pensions Act, 1871 (India), applicable to annuities payable to retiring Indian civil servants as pensions granted or continued by the Government of India within the meaning of s. 11 of the Pensions Act, 1871.

The retiring annuity or pension of a covenanted member of the Indian Civil Service is not subject to the restrictions imposed by ss. 11 and 12 of the Pensions Act, 1871 (India), and is liable to sequestration in the High Court of Justice in England.

Decision of Joyce J. affirmed.

Semble, that the Pensions Act, 1871 (India), applies only to British India and has no application to proceedings in England, and does not operate to defeat, in England, assignments of or charges on annuities or pensions of retiring Indian civil servants.

Mr. J. W. F. Dumergue entered the Indian Civil Service in 1877 and became a covenanted civil servant, having by a deed dated September 11, 1877, covenanted with the Secretary of State for India to obey certain orders, do certain things, not to divulge secrets, and so on, and, by clause 9, that he would forthwith upon his arrival at the Presidency of Madras become a subscriber to the Civil Fund and the Annuity Fund, and would from time to time, so long as he should continue in the service, conform to all the rules and regulations which should be in force in relation to the said funds respectively, and would pay such subscriptions as, under such rules and regulations, should become due or payable by him, or at the option of the Secretary of State in Council, or of the Governor in Council of the Presidency, allow the amount of such subscriptions to be deducted out of any money due or payable by the Government to him.

By a document dated February 26, 1903, and sent by Dumergue to the Chief Secretary to the Government of Madras, Dumergue stated that, having been permitted by the Secretary of State for India to resign the Indian Civil Service, with effect

C. A. 1911

KNILL v. DUMERGUE.

from April 1, 1903, he requested that he might be admitted to a Civil Service annuity from that date.

On March 19, 1903, the Officiating Accountant-General at St. George reported to the Chief Secretary to Government that the appellant's total service from September 11, 1877, to March 31, 1903, inclusive would amount to twenty-five years six months and twenty-seven days, and his active service to twenty-one years six months and twenty-seven days, and that on his retirement from April 1, 1903, he would be entitled to an annuity of 1000*l.* only under art. 561 of the Civil Service Regulations, 4th ed., and that there were no demands outstanding against him on the books of the office.

By an order of the Government of Madras dated March 21, 1903, stating that the appellant had been permitted to retire from the Indian Civil Service, he was admitted to an annuity of 1000*l.* payable in England with effect from April 1, 1903.

By a deed dated August 8, 1907, Dumergue assigned his annuity to trustees to secure the payment of a certain annual sum to his wife, and on August 10, 1907, notice of this assignment was given to the Secretary of State for India.

On March 21, 1910, H. A. Knill recovered judgment in the High Court of Justice against Dumergue for 3400*l.* and interest, and on June 30, 1910, Knill obtained a writ of sequestration to enforce the judgment. Notice of the writ had been served upon the Secretary of State for India, and the India Office had suspended payment of the pension pending the ascertainment of the rights of the parties.

On July 15, 1910, the plaintiff, Knill, took out an originating summons for an order that the sequestrators might be authorized and directed to receive from the India Office the pension already accrued or to accrue due to the defendant Dumergue, and to apply it as therein mentioned.

An affidavit of Mr. Walter Badock, of the India Office, stated as follows: "(1.) I am Accountant-General in the Establishment of the Secretary of State for India in Council and the facts deposed to in this my affidavit are known to me in my official capacity. (2.) By an order of the Government of Madras, dated March 21, 1903, Mr. John Willoughby Francis Dumergue, who is a retired

member of the Indian Civil Service and was a subscriber to the Madras Civil Annuity Fund, was admitted to a Madras civil annuity of 1000*l.* payable in England, with effect from April 1, 1903, during his life. (3.) The said annuity was granted under and is subject to the provisions of the Act 37 Vict. c. 12 (1), by which it is provided that every covenanted civil servant who shall be entitled to any of the Civil Annuity Funds shall be entitled on retirement if he shall have completed twenty-five years' service and twenty-one years' residence in India to a full annuity of 1000*l.* payable in England, or Company's rupees 10,650 payable in Madras."

In paragraph 4 of his affidavit Mr. Badock stated that the Government retained no claim upon the services of an annuitant or upon the annuity, to which the annuitant contributed by deduction from his pay a substantial portion, and that the Secretary of State in Council recognized the annuitant's right to assign his annuity, and that it was the practice of the India Office to recognize such assignments, including assignments to insurance companies and others. The affidavit also stated that the Secretary of State for India had received notice of the assignment, dated August 8, 1907, of the annuity by the appellant; and (paragraphs 9 and 10) that the Secretary of State was prepared to act on a final decision in the present proceedings and pay over the annuity to the successful party, and that he did not require to be made a party to the summons.

The Financial Despatch of February 10, 1871 (1), contained, amongst other things, the following statements: "Clause 26. There is however one rule of the existing system which without any departure from its general principle and intention is fairly susceptible of modification in favour of the service, and this modification Her Majesty's Government are all the more disposed to make because its benefits will accrue mainly to the less fortunate rather than to the most fortunate members of the service. If, on the one hand, civil servants who have served a given time are allowed no more than 1000*l.* a year although their subscriptions may have exceeded the value of an annuity of 400*l.*, it would seem, on the other hand, to be a correlative arrangement

(1) See note (1) on p. 219, post.

C. A. 1911 KNILL v. DUMERGUE.

that every civil servant who has served the same time should get no less than 1000*l.* a year although he may have subscribed for less than 400*l.* But as the rule now stands the latter is called upon to pay up the deficit as a fine. Her Majesty's Government are willing that this fine should be abandoned, and therefore I have now to convey to you their decision that every civil servant who has completed twenty-five years' service and twenty-one years' residence in India, whether his salary has been large or small, shall in future be allowed to retire on the full annuity of 1000*l.* 27. In addition to the invalid annuities Her Majesty's Government cannot consent to any augmentation of the existing scale, but they will not object to the adoption of an annual increase of 20*l.* instead of a quinquennial advance of 100*l.* as at present. 28. As these changes added to those which had already been made will render the continuance of the Annuity Funds entirely unnecessary, measures should be taken for their abolition. But it is of course to be understood that the 4 per cent. deduction from salaries is to be continued."

In the *Gazette* of India for 1875, at p. 647, it is stated that "the Governor-General of India in Council is pleased hereby to notify under the second section of the 37th Victoria, chapter 12, that the Secretary of State for India in Council has accepted the transfer made by the document set forth in the schedule hereto annexed of the assets and liabilities of the Madras Civil Service Annuity Fund," that is to say, a deed of transfer executed by the managers of the Madras Civil Service Annuity Fund dated June 10, 1875.

The summons was heard before Joyce J. on February 22 and 23 and April 25 and 26, 1911.

Younger, K.C., and *Beebee*, for the plaintiff.

Hughes, K.C., and *Whitmore Richards*, for the defendant. (1)

Edward Beaumont, for the trustees.

Counsel during their arguments referred to the Civil Service Regulations of the Government of India as to salary, leave, pensions, and travelling expenses (4th ed., corrected up to November 30, 1902). (2)

(1) See note (2) on p. 221, post.

(2) See note (3) on p. 222, post.

JOYCE J. The defendant, in the year 1877, entered the Civil Service of India in the Presidency of Madras, and, as then was usual I suppose, he on September 11 of that year entered into a deed of covenant with the Secretary of State for India in Council, which covenant was as follows: [His Lordship read clause 9 of the deed, and continued.] Although I cannot say that it has been definitely proved to me—as I have not a copy of the rules and regulations as they then existed, because the book I have is the 4th edition, and no doubt the rules have been altered from time to time—I have no doubt, and I must assume, that the rules and regulations referred to in clause 9 of the deed, as they then existed, provided for annuities being paid to civil servants upon their retirement.

The defendant is a civilian, and neither the Army Act, 1881, nor any other Act which relates exclusively to persons in the military service of the Crown—officers in the Army having pensions—has any possible application to this case.

In the year 1903 the defendant, having completed more than twenty-five years' service, retired, and on March 21, 1903, he, as appears from an extract from an order of the Government of Madras, dated March 21, 1903, became entitled to an annuity. [His Lordship read the material words of the order, and continued.] Now what the defendant became entitled to under that document is called an "annuity," but I cannot help thinking that such a payment is not inappropriately, and is indeed very commonly in ordinary language, called a "pension," and in point of fact such annuities as these are, in the titles to the chapters and in the headings and so on in the book of rules and regulations supplied to me, undoubtedly referred to—it may be with other payments —under the title of "pensions."

The question which I now have to decide is whether this annuity or pension, or whatever you choose to call it, to which the defendant became entitled under the order of the Government of Madras, was assignable by him or is liable to be reached by such a writ of sequestration as that on which this application is founded.

I think it is agreed, for it could not be denied, that, unless the defendant were prevented by some statute, applicable and effective

C. A. 1911 KNILL v. DUMERGUE. Joyce J.

directly or indirectly in this country, from assigning this annuity, he would be entitled to assign it, and it could be reached by this procedure by way of sequestration—that is to say, if the defendant is to succeed, there must be shewn to me some statute which has the effect of preventing this annuity from being assignable or liable to sequestration.

It is contended on behalf of the defendant that such a statutory enactment is to be found in the Indian statute of 1871, [his Lordship read ss. 11 and 12 of the Act, and continued:] and it is asserted that this annuity or pension must be taken to be and is a "pension granted by the Government"—that means the Government of India—"on account of past services," within the meaning of that expression in s. 11 of this Indian statute.

Now it seems to me that upon his retirement the defendant, but for the Imperial Act of 1874 which I shall have to mention presently, would have had no claim whatever upon the Government of India. Any claim that he had would have been upon the Madras Civil Service Annuity Fund. I cannot say that the history of that fund is strictly in evidence before me, but I have been referred to two cases—*Secretary of State for India* v. *Underwood* (1) and *East India Company* v. *Robertson* (2)—both of which, singularly enough, relate to the Presidency of Madras, and no doubt a great deal of information with reference to that fund and its history is to be found in the reports of those cases.

The Imperial Act, the East India Annuity Funds Act, 1874, provides—I take the marginal notes of the sections—for the assets and liabilities of Bengal, Madras, and Bombay Civil Funds being transferred to the Secretary of State—that is the Secretary of State for India—and for the annuities charged on those funds being payable from the revenues of India. The 2nd section, which provides for annuities being payable, concludes in this way: "Every covenanted civil servant"—the defendant is a covenanted civil servant—"who shall be a subscriber to any of the said Civil Annuity Funds"—the defendant was a subscriber to the Madras Civil Service Annuity Funds—"at or after the date of such notification"—that is to say the notification, by despatch, of the transfer of the funds—"shall be entitled on

(1) (1870) L. R. 4 H. L. 580. (2) (1859) 12 Moo. P. C. 400.

retirement to the benefits granted by the despatch," and the section proceeds to say that those benefits shall be, if the civil servant has completed twenty-five years' service and twenty-one years' residence in India, a full annuity of 1000*l.* payable in the manner pointed out. The transfer mentioned in the section was notified on September 16, 1875.

Of course I cannot forget that the defendant had not yet entered the service when the Act of 1874 was passed, but I take it at any rate that before that Act such an annuity or pension as the defendant is now entitled to, or as a person in a similar position to his was then entitled to, was not a pension granted by the Government of India on account of past services within the meaning of s. 11 of the Indian Act.

It is contended, however, on behalf of the defendant that the Act of 1874 alters the position, and that when the Government took over the Civil Service Annuity Funds, with the liability of such funds, this had the effect of converting the annuities to which civil servants were entitled under the rules and regulations into pensions granted by the Government of India on account of past services, within the meaning of that expression in s. 11 of the Indian statute. I am unable to accept that argument. It seems to me that the annuity payable by the Government of India to the defendant is an annuity payable in pursuance of obligations undertaken within the provisions of the Act of 1874 and the subsequent rules, and really and practically, although, no doubt, the Government did contribute in a small degree to the funds, this annuity is payable out of funds provided by the civil servants themselves. It is not the case of a grant by the Indian Government out of any grace or favour to their own servants for past services; but it seems to me that under the deed of covenant and the rules and regulations the defendant might have sued the Government for this annuity and might have compelled them to grant it—if I am entitled to use the word "grant" with reference to the evidencing of the title of the defendant to the annuity. As I have already said, the words in the order relating to the annuity and the circumstances under which the civil servant is entitled do not constitute a "grant," as he is "admitted to an annuity," but that is a mere matter of words,

C. A. 1911

KNILL v. DUMERGUE.

Joyce J.

and I have no doubt the order followed the wording of the old form.

If this Indian statute applied, that is to say, if this were a pension granted by the Indian Government on account of past services, there would still remain the question what effect exactly s. 11 of the Indian statute has or could have in the circumstances of this case. I am not going to discuss that question because I am of opinion, and I decide this case upon the ground, that the annuity to which the defendant became entitled under the order of the Madras Government of March 21, 1903, is not such a pension granted by the Government on account of past services as is contemplated by s. 11 of the Indian Act, or, in other words, that it is not such a pension within the meaning of that expression in the Act. Consequently, in my opinion, the application succeeds.

R. M.

C. A.

The defendant appealed. The appeal came on for hearing on June 28, 1911.

Hughes, K.C., and *Whitmore Richards*, for the appellant. The annuity or pension to which the appellant is entitled is not assignable and cannot be reached by sequestration.

It may be admitted that before the passing of the East India Annuity Funds Act, 1874, a civil servant entitled to an annuity from the Madras Civil Service Annuity Fund had a claim only against that fund and its trustees, as his annuity could not then be said to be a pension "granted or continued by Government" "on account of past services" within the meaning of s. 11 of the Indian Pensions Act, 1871. But, assuming that annuities payable to civil servants in the position of the defendant were not prior to the passing of the Act of 1874 within the Act of 1871, and that up to 1874 there was no restriction on the right of such civil servants to assign their annuities, and no restriction upon the right to levy execution upon the annuities, the Act of 1874 entirely altered the position of the annuitants, and brought them within the operation of the Indian Act of 1871.

The preamble to the Act of 1874 to some extent shews the

history of the three funds dealt with by that Act. The Madras Fund was established under the authority of a despatch sent in 1824, and by the despatch of February 10, 1871, changes as to the grant of annuities were authorized by the Secretary of State for India in Council. That despatch contemplated the granting of an annuity of 1000*l.* to a civil servant retiring after twenty-five years' service and twenty-one years' residence in India, and the preamble to the Act of 1874 shews that steps were taken to obtain the assent of the existing subscribers to the three funds to the "surrender" of "the accumulated annuity capital of the said funds to the Secretary of State for India in Council" on the terms offered by him. The preamble further shews that the object of the Act of 1874 was to validate the transfer, by the trustees of the funds, of the assets and liabilities thereof. Sect. 1 of the Act declares the legality of the transfer. Then s. 2 provides that as soon as the assets and liabilities have been transferred and the acceptance thereof has been notified (as it was by the notification set out in the *Gazette* of India for 1875) all existing liabilities of the funds shall be deemed to be liabilities of the revenue of India which may be enforced against the Secretary of State as they might have been against the trustees of the funds if the Act had not been passed. The same section provides that in future covenanted civil servants who subscribe to any of the funds shall be entitled to the benefits granted by the despatch of February, 1871—that is to say in a case like the present a full annuity of 1000*l.* if payable in England.

The effect of the Act of 1874 was that when the Secretary of State had accepted the funds and his acceptance had been notified the existing Civil Annuity Funds came to an end, and in lieu thereof there was substituted the liability of the general revenues of India; and any future pensions to retiring civil servants were converted into "pensions granted or continued by Government" "on account of past services" within the meaning of s. 11 of the Indian Act of 1871. That section says that those pensions shall not be liable to seizure, attachment, or sequestration by process of any Court in British India at the instance of a creditor, and by s. 12 of the same Act all assignments of and securities on the annuities are declared to be null and void.

C. A. 1911 KNILL v. DUMERGUE.

The Indian legislation must be looked at to see what the effect of giving a pension is. Whatever may be the effect of s. 11, which deals with procedure, the fact that s. 12 renders assignments of the pensions void is a sufficient ground for holding that they cannot be reached by legal process, although they were given for past services: *Lucas* v. *Harris*. (1) The Court should not by its order indirectly make assignable a pension which the Legislature has declared shall not be assignable: *Birch* v. *Birch*. (2)

[FARWELL L.J. referred to *In re Saunders*. (3)]

That case was as to the jurisdiction of the Court to order payment of an Indian pension to the pensioner's trustee in bankruptcy under s. 53, sub-s. 2, of the Bankruptcy Act, 1883. The condition on which Indian legislation grants pensions is that they shall be inalienable, and it is immaterial in what country the assignment takes place: *In re Fitzgerald* (4); *Anstruther* v. *Adair*. (5) [They also referred to *Carew* v. *Cooper* (6), and to the Civil Service Regulations of the Government of India as to salary, leave, pensions, and travelling expenses. (7)]

Younger, K.C., and *Beebee*, for the plaintiff, and *Edward Beaumont*, for the trustees, were not called upon.

COZENS-HARDY M.R. This is an appeal from a decision of Joyce J., who has held that a certain annuity which the appellant is entitled to receive and is receiving is of such a nature that it can be taken in sequestration.

It is necessary to consider with some amount of care what is the real position of the appellant and of his predecessors in the Madras Civil Service. From the recitals in the Act of 1874, to which I shall have to refer, it appears that as long ago as the year 1824 there was established a Madras Civil Service Annuity Fund. That fund was fed—I am using very general language—by deductions of 4 per cent. from the salaries of the civil servants who subscribed to it, and by grants made by the old East India Company and afterwards by the Indian Government, and on the

(1) (1886) 18 Q. B. D. 127.
(2) (1883) 8 P. D. 163, 165.
(3) [1895] 2 Q. B. 117, 424.
(4) [1904] 1 Ch. 573.
(5) (1834) 2 My. & K. 513.
(6) (1863) 4 Giff. 619.
(7) See note (3) on p. 222, post.

average the subscribers paid what was equivalent to two-fifths, and the old East India Company, and subsequently the Government of India, found the remaining three-fifths.

Then came an Indian Act of 1871 "to consolidate and amend the law relating to pensions and grants by Government of money or land revenue." That Act states that it extends to the whole of British India, and it contains certain enactments with reference to a particular class of pensions and the mode of payment of them. Sect. 11 of the Act is as follows: "No pensions granted or continued by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance, and no money due or to become due on account of any such pension or allowance, shall be liable to seizure, attachment or sequestration by process of any Court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court." The section is limited in terms to Courts in British India. Then s. 12 enacts as follows: "All assignments, agreements, orders, sales and securities of every kind made by the person entitled to any pension, pay or allowance mentioned in section eleven, in respect of any money not payable at or before the making thereof, on account of any such pension, pay or allowance, or for giving or assigning any future interest therein are null and void." Now as a matter of construction I think it is quite plain—as, indeed, Mr. Hughes admitted—that the Act of 1871 did not at the time when it was passed apply to the right of a Madras civil servant to claim an annuity out of the Madras Civil Service Annuity Fund against the trustees of that fund. It only applied to pensions "granted or continued by Government," and the pensions—if they be pensions—or annuities which could be claimed against that fund were not either granted or continued by Government. Therefore it seems to me quite plain that at the date when the Indian Act of 1871 was passed those pensions or annuities were entirely outside the operation and effect of that Act.

Then came an Imperial Act, the East India Annuity Funds Act, 1874. This Act recites that there was a Bengal Civil Service Annuity Fund, that there was a Madras Civil Service Annuity

C. A. 1911 KNILL v. DUMERGUE. Cozens-Hardy M.R.

Fund, and that there was an annuity branch of the Bombay Civil Fund, and that all these Civil Annuity Funds "were supported by the subscriptions of the civil servants of the said Company"—the East India Company—"and by certain contributions from the said Company." Then mention is made of a financial despatch to the Government of India suggesting certain changes with reference to these funds—as I read it, doing away with the separate funds in the separate Presidencies and making one Civil Service Annuity Fund. Then the Act recites that means have been taken to ascertain whether the subscribers were willing to assent to the proposition that the Government of India should take over the Annuity Funds and the liabilities of those funds, and enacts, in s. 1, that the trustees of these several funds might transfer to the Secretary of State for India in Council the assets and liabilities of the several funds, and that the Secretary of State for India in Council might accept the same.

Then, by s. 2, it is enacted that, as soon as the assets and liabilities of the funds should be transferred to the Secretary of State and the acceptance thereof should be notified by the Government of India, "all existing liabilities of the said funds shall be deemed to be liabilities of the revenues of India, and all such liabilities may be enforced against the Secretary of State for India in Council in like manner as they might have been enforced against the trustees of the said funds if this Act had not been passed." The Act there states what I think was quite apparent before, that the only liability prior to the Act of 1874 was against the trustees of the funds and not against the Government. Then s. 2 says, "and every civil servant who shall at the date of such notification be an incumbent of an annuity from any of the said Civil Annuity Funds, or from any earlier fund the assets and liabilities of which shall have been transferred as aforesaid, shall be entitled to receive from time to time the amount of such annuity from the revenues of India." Then the section contains a provision, which applies not merely to the past but to the future, that "every covenanted civil servant who shall be a subscriber to any of the said Civil Annuity Funds at or after the date of such notification shall be entitled on retirement to the benefits granted by the despatch of the Secretary of State in

Council to the Government of India, dated the tenth of February one thousand eight hundred and seventy-one." These benefits are set out in the Act, and in the present case the appellant was entitled to 1000*l.* a year. Sect. 3 of the Act of 1874 contains a proviso "that nothing in this Act contained shall prejudice any claim which may be made by any subscriber to the said Civil Service Annuity Funds, or by the representatives of any such subscriber, upon the funds so transferred," and a provision as to how any question as to the liability or alleged liability of the Indian Government was to be determined.

It was admitted by Mr. Hughes—and most properly admitted, because it was too plain for argument—that prior to 1874 there was no restriction on the right to assign this annuity, and no restriction upon the right to levy execution upon the annuity, in whatever form would be appropriate, and in fact that the Indian Act had nothing whatever to do with it; and I ask myself, first of all, this question: Did the Act of 1874 entirely alter the position of these annuitants; did it bring them entirely within the operation of the Act of 1871, which is not recited or mentioned in the Imperial statute of 1874; did it deprive those subscribers of their rights as against the particular funds; is it possible to say that the effect of that Act of 1874 was to deprive the subscribers of the special right which they had against the funds and the trustees of those funds, and to substitute instead of that what I would call the unsecured liability of the Government of India? I cannot read s. 3 as having that effect at all; it seems to me most carefully to preserve the rights of the then existing subscribers against the funds which were handed over to the Indian Government, for it says that "nothing in this Act contained shall prejudice any claim" which any subscriber might make upon the funds transferred. I think, therefore, that it is a fallacy to say that the effect of the Act of 1874 was to terminate completely and for ever these Civil Annuity Funds, and to substitute, in lieu thereof, simply and solely the liability of the general revenues of the Government of India.

The next material date is 1877, in which year the appellant entered the Indian Civil Service. He became a covenanted civil servant, and we have in evidence the covenants which he entered

C. A. 1911 KNILL v. DUMERGUE. Cozens-Hardy M.R.

into. The deed is dated September 11, 1877—three years after the passing of the Act of 1874. By the first clauses of the deed, which are perhaps not material, he covenanted with the Secretary of State to obey certain orders, to do certain things, not to divulge secrets, and so on; but when we come to clause 9 we find something which is so important as, in my view, really to dispose of this appeal. We have been told that the Annuity Fund has ceased to exist. All I can say is that in clause 9 of the deed this gentleman covenants that he "shall and will forthwith upon his arrival at the said Presidency become a subscriber to the Civil Fund"—we have nothing to do with that here—"and the Annuity Fund and shall and will from time to time, so long as he shall continue in the said service, conform to all the rules and regulations which shall be in force in relation to the said funds respectively, and will pay such subscriptions as, under such rules and regulations, shall become due or payable by him, or, at the option of the said Secretary of State in Council, or of the Governor in Council of the said Presidency, allow the amount of such subscriptions to be deducted out of any money due or payable by the Government to him."

This gentleman has covenanted to subscribe to the Annuity Fund; has he so subscribed? We have the best possible evidence of this in the affidavit of Mr. Badock, of the India Office. He says: "I am Accountant-General in the Establishment of the Secretary of State for India in Council and the facts deposed to in this my affidavit are known to me in my official capacity." We have been gravely asked to treat this affidavit as a mere opinion of Mr. Badock, and, no doubt, to treat him as one who is not competent to advise on the point of law that is suggested. Let us see what he says, not as a matter of opinion, but as a matter of fact within his own knowledge as Accountant-General. The appellant retired in 1903, and the affidavit says that he "was a subscriber to the Madras Civil Service Fund" and "was admitted to a Madras civil annuity of 1000*l.* payable in England." Then paragraph 3 of the affidavit says that the annuity was granted under and is subject to the provisions of the Act of 1874, and in paragraph 4 the deponent states that the Government retains no claim upon the services of an annuitant

or upon the annuity, to which the annuitant contributes by deduction from his pay a substantial portion, and that "the Secretary of State in Council recognizes the right of the annuitant to assign the annuity and it is the practice of the India Office to recognize such assignments, including assignments to insurance offices and others."

Now is it true, as Mr. Badock says in his affidavit, that the appellant was a subscriber to the Madras Civil Annuity Fund? I really cannot listen to suggestions to the contrary. He covenanted that he would subscribe to it as soon as he got to Madras, and the official authority at the India Office says that he was a subscriber to the fund. The percentage from his pay was deducted from his subscriptions, and he claimed an annuity of 1000*l.* a year under and by virtue of the regulations by which he agreed to abide. I see no reason for holding that his position is in any way different from that which he would have occupied before the passing of the Act of 1874 simply because what I may call the administration and the machinery of the fund have been altered. The appellant's annuity still remains an annuity to which he is entitled as a matter of contract by the Government by virtue of payments to the extent of two-fifths being made by himself and the balance being found by the Indian Government, as it had been in respect of other annuities by the predecessors of the Indian Government from the year 1824 downwards. Therefore it seems to me that every consideration applicable in deciding that an annuity of the class is not, within the meaning of the Act of 1871, a pension at all applies just as much now as it did before.

I shrink from saying that the Act of 1874 brought the whole class of Indian civil servants within the operation of the Act of 1871. On that ground, which is substantially the ground upon which Joyce J. went, I think his decision was perfectly right. But although it is not necessary for my decision, I think that the Indian Act of 1871 does not apply at all to proceedings in this country. It is quite clear that s. 11 does not apply. In terms it only applies to Courts in British India. The operation of the Act is in terms said to extend to British India. I am not prepared to say the provision in s. 12 is one which, in this

C. A. 1911 KNILL v. DUMERGUE. Cozens-Hardy M.R.

country, ought to have any effect given to it or that it has any operation at all here. With certain exceptions which it is not necessary to specify, a writ of sequestration is a matter of right, and not a matter of discretion which the Court ought or ought not to exercise. I think that on both grounds—on that upon which Joyce J. went, and on the ground that the Act of 1871 does not apply to this country—the decision appealed from is quite right, and that this appeal should be dismissed with the usual consequences.

FARWELL L.J. I am of the same opinion. In 1824 a Civil Annuity Fund in Madras was commenced by the subscriptions of the civil servants in that Presidency, supplemented by contributions from the old East India Company, and was continued until 1874, the subscriptions being paid, and the contributions being made to trustees, who were the persons, and the only persons, against whom any claim could be made for an annuity.

Mr. Hughes admitted—and I think he was right in doing so, for it appears to me to be too plain for argument—that the Act of 1871 had no application whatever to these annuity funds before 1874. But he says that the Imperial statute of 1874, although it does not refer to the Indian Act of 1871 at all, has altered matters altogether; that it has destroyed the old Annuity Fund and made the annuities a matter of grant by the Government of India, and, therefore, that the Indian Act of 1871 now applies. I am wholly unable to agree with this contention. In the first place, I think it is clear that the fund is kept alive. The mere fact that Mr. Dumergue, who joined in 1877,—three years after the Act of 1874 was passed—covenants in terms that he will subscribe to the fund, covenants with the Government of India, which of course knows all about these matters, is to my mind almost conclusive that the fund is still subsisting. And it is not immaterial to observe that regulation 561 makes the annuity commence from the date of the covenant entered into by the civil servant. Moreover, I find nothing in the preamble or in the enacting words of the Act of 1874 to shew any intention to destroy any liability or the existence of any

fund. There were the three funds, one for each of the Presidencies of Bengal, Madras, and Bombay, subscribed to separately, supplemented separately, and separately vested in different trustees. The preamble to the Act of 1874 states that certain changes render the continuance of the machinery of the funds unnecessary. That is machinery as distinct from substance, but the claim of an annuitant on any of these funds is by no means machinery. It is most substantial, and when I read the Act I find, not that the liabilities are extinguished, but that they are transferred, so that the Secretary of State is now substituted for, and takes the position of, the trustees of the old three funds; he takes over the assets and he undertakes the liabilities.

It is plain that the annuitants were treated, not as grantees, but as persons entitled by contract to share in a fund which is vested and remains vested in the Secretary of State for the purpose of answering their claims. A very curious expression as regards the older subscribers—"an incumbent of an annuity from any of the said Civil Annuity Funds"—occurs in s. 2 of the Act of 1874, and now, under the present system and phraseology, we do not find anywhere the grant of a pension or of an annuity, but the form is that the civil servant is "admitted to an annuity" of so much per annum, either in England or in India as the case may be. That to my mind shews an intention to preserve as nearly as possible the old existing arrangements, getting rid of the superfluous machinery applicable to the three Presidencies, and substituting the Secretary of State for the trustees, so that the civil servant would now subscribe, not to the trustees, but to the account of these particular annuity funds. The result is that I find nothing whatever in the Act of 1874 to produce the extraordinary result contended for on behalf of the appellant—that the Legislature should for the first time in 1874 have applied provisions of an Indian Act of 1871, which had never before been so applied, to annuities which had been founded as long before as 1824. In my opinion the case is reasonably plain, and Joyce J. was perfectly right.

I should add that I entirely agree with the Master of the Rolls on the second ground. A provision in an Act extending in terms

C. A. 1911 KNILL v. DUMERGUE. Farwell L.J.

to British India only, to the effect that "no civil Court shall entertain any suit relating to any pension," cannot possibly extend to England. Nor can s. 11 of the Act of 1871 possibly extend to England. Sect. 12 is relied on because it was said that non-assignability of the annuity was a condition on which the annuity was granted, and that the Government would not pay an assignee. But that is not so in fact; it is more than thirty years since the funds were taken over, and the Government make no such condition, as appears by the affidavit of the official of the India Office, who says they have always recognized the right of the annuitant to assign, and have recognized assignments.

I therefore think the appeal fails.

KENNEDY L.J. I am of the same opinion. The question on this appeal is whether or not the annuity or pension to which the appellant, a retired Indian civil servant, became entitled is or is not capable of being assigned and liable to sequestration. Joyce J. has decided that it is so capable of assignment and liable to sequestration, and I agree.

I think we can come to but one conclusion upon the affidavit of Mr. Badock, namely, that this annuity was granted and is subject to the provisions of the East India Annuity Funds Act, 1874. So far as that Act is concerned, there is not one word which would lead to the conclusion that that which is obtained by a civil servant in accordance with the Act, after he has discharged his duties for a certain period, is in any way incapable of assignment or not liable to sequestration. This is not a case of half-pay or of pay during continuance in the service. It is a payment—to use the most neutral word—made annually to the appellant in accordance with the agreement made with him, when he entered the Civil Service, in accordance with the Act.

But it is contended on behalf of the appellant that you must look back at the Indian Act of 1871, and that there you will find words which apply so as to defeat the rights of those who are claiming a sequestration or under an assignment. Now I am of opinion that it is an Act the operation of the whole of which is

confined to India. I am of opinion that, even if the portion of the Act headed "IV. Miscellaneous" which begins with s. 11 embraces s. 12, which the appellant's counsel say is the most material section in his favour, it was never intended to have any application outside British India, to which it is by the terms of s. 1 (under the heading "I. Preliminary") confined.

I am also of opinion—speaking for myself and without laying too much stress upon the word "granted," as to which I desire to add nothing to the comments already made by the Master of the Rolls and Farwell L.J., but assuming for a moment that it would not be impossible or unreasonable to treat that which Mr. Dumergue has got, on his retirement from the Indian Civil Service, as in some sense a pension granted to him—that when you read the Act of 1871 with care it is clear that the pension granted to him is not a pension granted to him within the meaning of that Act. It seems to me that the pensions referred to in that Act have no connection at all with the Civil Service "pension"—if I may use that word—or to an "annuity" which is granted—if I may use that popular phrase—to a member of the Covenanted Civil Service when he leaves. The pensions referred to in the Act of 1871, which, according to s. 8 of that Act, may apparently be pensions in money or grants of money or land value, are according to that section, first of all, to "be paid by the Collector or Deputy Commissioner or other authorized officer, subject to such rules as may, from time to time, be prescribed by the Chief Controlling Revenue Authority." What that has to do with a sum of money in the form of an annuity, to which gentlemen in the position of Mr. Dumergue become entitled on receiving the kind of certificate which has been produced, shewing that they are entitled to it in full and that there is no deduction for any liability to the Government, I am at a loss to understand. It appears to me that "pensions or grants" here means pensions or grants which are not like those to other civil servants, who, on retiring, are paid by the Indian Government in the way we know and in the way which is set out in the Civil Service Regulations, of which the fourth and fifth editions have been before us.

C. A. 1911 KNILL v. DUMERGUE. Kennedy L.J.

When you look at s. 10 of the Act of 1871 you find that "the local Government may, with the consent of the holder, order the whole or any part of his pension or grant of money or land revenue to be commuted for a lump sum on such terms as may seem fit." That has no application whatever to Civil Service annuities or pensions, as to which we find express prescriptions in the Act of 1874 and in the Civil Service Regulations, whether they take the form of a pension, which would be an annuity at a certain rate, or, in the case of service for less than five years, they take the form of an annuity.

Then turning to s. 14 of the Act of 1871, we find that "the Chief Controlling Revenue Authority may, with the consent of the local Government, from time to time, make rules consistent with this Act respecting all or any of the following matters." Among the matters stated are "the place and times at which, and the person to whom, any pension shall be paid"—a matter expressly regulated by the rules and regulations of the Civil Service; "inquiries into the identity of claimants"; "delivery of certificates to pensioners"; "registers of such certificates"; "reference to the civil Court, under section 6, of persons claiming a right of succession to, or participation in, pensions or grants of money or land revenue payable by Government, and generally for the guidance of officers under this Act." It seems to me that having regard to the kind of things there referred to, such as pensions or grants of money or land revenue payable by the Indian Government, and the date of the Act, there is nothing to justify us in incorporating the Act of 1871 in the legislation of 1874, or in applying the expression "pensions granted or continued by Government" used in the Act of 1871 as a phrase in any shape applicable to that which is obtained after the termination of his service by a covenanted civil servant such as Mr. Dumergue was.

I therefore hold, in the first instance, that, even if annuities like that to which the appellant is entitled could be treated as pensions to which the Act of 1871 relates, that Act was intended to have an entirely local application to India; and, further, I agree with that which in substance has been also expressed by my colleagues, that the appellant's pension or annuity, whichever

you call it, is not a pension or annuity granted under the Act of 1871, or one to which that Act applies.

Appeal dismissed with costs.

Solicitors for appellant: *Valpy, Peckham & Chaplin.*

Solicitors for plaintiff: *Billing, Thompson & Co., for Fairfax Spofforth, Bristol.*

Solicitor for the trustees: *Edward Downes.*

NOTES.

(1) The Imperial statute, the East India Funds Act, 1874 (37 & 38 Vict. c. 12). The preamble, after referring to the establishment of an institution called "The Bengal Civil Service Annuity Fund . . . for the grant of annuities to the civil servants of" the East India "Company, on their retiring from the service, who should become subscribers to the said institution," continued as follows: "And whereas another institution, known as the Madras Civil Service Annuity Fund, founded on certain annuity funds of earlier dates, was established in Madras, under the authority given by the said Court of Directors" of the Company "in a public despatch to the Governor in Council at Fort St. George, dated the thirty-first of December one thousand eight hundred and twenty-four, for the grant of similar annuities." And after reciting the establishment of an institution called the Annuity Branch of the Bombay Civil Fund, the preamble continued as follows: "And whereas, in a financial despatch to the Government of India, dated the tenth of February one thousand eight hundred and seventy-one, certain changes respecting the grant of annuities were authorised by the Secretary of State for India in Council, which, taken in connexion with other changes which had been previously made also under the authority of the said Secretary of State for India in Council, rendered the continuance of the machinery of the Bengal, Madras, and Bombay Civil Annuity Funds unnecessary: And whereas, in accordance with the instructions contained in the aforesaid despatch the Government of India caused the inquiry to be made whether, upon the terms respecting the grant of annuities offered by the Secretary of State in the said despatch, the subscribers to the said Civil Annuity Funds were willing to surrender the accumulated annuity capital of the said funds to the Secretary of State for India in Council; and the proposition so to make over the accumulated annuity capital on the terms offered by the Secretary of State was carried in the affirmative by the subscribers to the Bengal, Madras, and Bombay Civil Annuity Funds by a large majority of votes: And whereas, in order to avoid any doubt that may arise in regard to the legality of such transfer, it is necessary to make provision by law for enabling the trustees of the said Civil Annuity Funds to transfer the assets and liabilities thereof, including the assets and liabilities hereinafter referred to, to the Secretary of State for

C. A. 1911 KNILL v. DUMERGUE.

India in Council, and for enabling the Secretary of State for India in Council to accept the same : "

It was accordingly enacted as follows :—

Sect. 1. "It shall be lawful for the trustees of the Bengal Civil Service Annuity Fund, and of the Madras Civil Service Annuity Fund, and of the Annuity Branch of the Bombay Civil Fund to transfer to the Secretary of State for India in Council the assets and liabilities of the Bengal, Madras, and Bombay Civil Annuity Funds, including any assets and liabilities to which the trustees of the Madras and Bombay Civil Annuity Funds may have succeeded as representing the trustees of the earlier funds at Madras and Bombay, and for the Secretary of State for India in Council to accept the same."

Sect. 2. "As soon as the assets and liabilities of the said Civil Annuity Funds, including as aforesaid, shall be transferred to the Secretary of State for India in Council, and the acceptance thereof by the Secretary of State for India in Council notified by the Government of India, all existing liabilities of the said funds shall be deemed to be liabilities of the revenues of India, and all such liabilities may be enforced against the Secretary of State for India in Council in like manner as they might have been enforced against the trustees of the said funds if this Act had not been passed; and every civil servant who shall at the date of such notification be an incumbent of an annuity from any of the said Civil Annuity Funds, or from any earlier fund the assets and liabilities of which shall have been transferred as aforesaid, shall be entitled to receive from time to time the amount of such annuity from the revenues of India; and every covenanted civil servant who shall be a subscriber to any of the said Civil Annuity Funds at or after the date of such notification shall be entitled on retirement to the benefits granted by the despatch of the Secretary of State in Council to the Government of India, dated the tenth of February one thousand eight hundred and seventy-one; namely,

"If he shall have completed twenty-five years service and twenty-one years residence in India a full annuity of one thousand pounds payable in England, or Company's rupees ten thousand six hundred and sixty-six ten annas and eight pies payable in Bengal, or Company's rupees ten thousand six hundred and fifty payable in Madras or Bombay :

"And if he shall be compelled to resign the service on account of ill health, clearly proved by medical certificate,

If under five years service, a grant of five hundred pounds ;

If of five years service and under six, an invalid annuity of one hundred and fifty pounds;

If of six years service and under seven, an invalid annuity of one hundred and seventy pounds ;

and so on, an increase of twenty pounds being made to the annuity for each year's service, the highest invalid annuity being four hundred and fifty pounds for a service of twenty years."

Sect. 3. "Provided, that nothing in this Act contained shall prejudice any claim which may be made by any subscriber to the said Civil Service Annuity Funds, or by the representatives of any such subscriber, upon the funds so transferred; and in case any question shall arise between any such

subscriber or the representatives of any deceased subscriber on the one hand, and the Secretary of State for India in Council on the other, as to any liability or alleged liability of the said funds, such question shall be determined by the Court of Appeal appointed by the Judicature Act, 1873, in such manner as may be provided by any general orders, or as the said Court may, on special application, think fit to prescribe, anything in the Statute of Limitations to the contrary notwithstanding."

(2) The defendant's counsel referred to an Indian Act (called "Act No. XXIII. of 1871") which was passed on August 8, 1871. This Act was entitled "An Act to consolidate and amend the law relating to pensions and grants by Government of money or land-revenue," and after reciting that it was expedient so to consolidate and amend the law, it contained (inter alia) the following provisions:—

"I. PRELIMINARY."

Sect. 1. "This Act may be called 'The Pensions Act, 1871': It extends to the whole of British India; and it shall come into force on the date of the passing thereof."

"II. RIGHTS TO PENSIONS."

Sect. 4. "Except as hereinafter provided no civil Court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension may have been substituted."

Sect. 5. "Any person having a claim relating to any such pension or grant is to refer such claim to the Collector of the district or Deputy Commissioner or other officer authorised in this behalf by the local Government, and such Collector, Deputy Commissioner or other officer shall dispose of such claims in accordance with such rules as the Chief Revenue Authority may, subject to the general control of the local Government, from time to time prescribe in this behalf."

Sect. 6. "A civil Court otherwise competent to try the same shall take cognizance of any such claim upon receiving a certificate from such Collector, Deputy Commissioner or other officer authorised in that behalf that the case may be so tried, but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly."

"III. MODE OF PAYMENT."

Sect. 8. "All pensions or grants by Government of money or land-revenue shall be paid by the Collector or the Deputy Commissioner or other officer, subject to such rules as may, from time to time, be prescribed by the Chief Controlling Revenue Authority."

Sect. 10. "The local Government may, with the consent of the holder, order the whole or any part of his pension or grant of money or land-revenue to be commuted for a lump sum on such terms as may seem fit."

C. A.
1911
KNILL
v.
DUMERGUE.

"IV. MISCELLANEOUS."

Sect. 11. "No pensions granted or continued by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance, and no money due or to become due on account of any such pension or allowance, shall be liable to seizure, attachment, or sequestration by process of any Court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court."

Sect. 12. "All assignments, agreements, orders, sales and securities of every kind made by the person entitled to any pension, pay or allowance mentioned in section 11, in respect of any money not payable at or before the making thereof, on account of any such pension, pay, or allowance, or for giving or assigning any future interest therein are null and void."

Sect. 14. "The Chief Controlling Revenue Authority may, with the consent of the local Government, from time to time make rules consistent with this Act respecting all or any of the following matters:—

(1.) the place and times at which, and the person to whom, any pension shall be paid;
(2.) inquiries into the identity of claimants;
(3.) records to be kept on the subject of pensions;
(4.) transmission of such records;
(5.) correction of such records;
(6.) delivery of certificates to pensioners;
(7.) registers of such certificates;
(8.) reference to the civil Court, under s. 6, of persons claiming a right of succession to, or participation in, pensions or grants of money or land-revenue payable by Government,

and generally for the guidance of officers under this Act.

"All such rules shall be published in the local official Gazette, and shall thereupon have the force of law."

(3) The following provisions of the Civil Service Regulations were referred to in the arguments of counsel in the Court of Appeal:—

Rule 349. "The conditions of service of officers of the following classes include special rules for pensions which are laid down in the chapters noted against each, viz.: . . . . (c) Members of the Indian Civil Service (see Chapter XXV.) . . . . "

Rule 351. "Future good conduct is an implied condition of every grant of a pension. The Government reserves to itself the right of withholding or withdrawing a pension if the pensioner be convicted of serious crime or be guilty of grave misconduct."

The rules in Chapter XXV. were numbered 561 to 565.

Rule 561. "An officer who has been twenty-five years in the service, counting from the date of his covenant, or from the date of the despatch of the Secretary of State announcing his appointment (whichever may have been earlier), and who has rendered twenty-one years' active service, is entitled, on his resignation of the service being accepted, to an annuity of one thousand pounds."

Rule 905. "The rules in this chapter"—Chapter XLVII., containing rules 905 to 929—"apply to all officers applying for pensions under these

regulations except (*a*) Members of the Indian Civil Service (Chapter XLIX.); (*b*) Chaplains . . . . ; (*c*) Judges of the High Courts, for whom no special procedure is laid down."

Chapter XLVIII., as to payment of pensions, contained rules 930 to 973.

Rule 936. "Transfer of a pension from an Indian Treasury to the Home Treasury and vice versa is permitted within reasonable limits whenever desired."

Rule 943. "A pension is payable in India monthly on and after the first day of the following month under the following rules . . . ." [one of which referred, in regard to the liability of pensions to attachment by a civil Court, to s. 11 of Act XXIII. of 1871, which was set out].

Chapter XLIX. contained rules 974 to 987.

Rule 978. " . . . . (*c*) In the case of an officer on the Madras or Bombay Establishment, the annuity or gratuity will be sanctioned by the Government of Madras or Bombay, as the case may be."

Rule 983. "Payment of annuities and gratuities may be taken at the Home Treasury in sterling money . . . ."

Rule 984. "Transfer from the Home Treasury to an Indian Treasury, and vice versa, is permitted twice only."

F. E.

In re IND, COOPE & CO., LIMITED. FISHER *v.* THE COMPANY. KNOX *v.* THE COMPANY. ARNOLD *v.* THE COMPANY.

[1908 I. 2267.]

[1909 I. 9.]

[1909 I. 5.]

Mortgage—Debenture—Priority—Specific Mortgage—Floating Charge—Assignment—Rent in arrear—Drawbacks—Debts—Notice—Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 5—*Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 10.

The principle of *Moss* v. *Gallimore* (1779) 1 Doug. 279, and *Rogers* v. *Humphreys* (1835) 4 Ad. & E. 299, that the mortgagor is in possession and receives the rents of the mortgaged property only by leave of the mortgagee, and the mortgagee is the reversioner expectant on leases of the mortgaged property and is entitled on taking possession of it to all arrears of rent in respect of leases made before the date of the mortgage, or subsequently thereto by authority of the mortgagee, is not affected by the provisions of s. 25, sub-s. 5, of the Judicature Act, 1873, or s. 10 of the Conveyancing Act, 1881, which deal with procedure only.

A company issued debenture stock secured by a trust deed whereby

WARRINGTON J.

1911

IND, COOPE & CO., LIMITED, *In re.*

FISHER *v.* THE COMPANY.

KNOX *v.* THE COMPANY.

ARNOLD *v.* THE COMPANY.

certain freehold and leasehold properties were specifically mortgaged to the trustees of the deed, and a floating charge was created in their favour on all the assets of the company. Subsequently the company assigned to W. and H. certain book debts, including rents in arrear in respect of leases, some of which were specifically included in the trust deed, and also certain drawbacks owing to the company by the Crown in respect of beer exported by the company on which the company was entitled to receive payments equal to the amount of the Excise brewing duty paid thereon. W. and H. gave notice of their assignment to the tenants from whom rents were due and to the shipping agents who had been employed by the company to export the beer; but gave no notice to the Crown. A receiver and manager of the assets and undertaking of the company was appointed on behalf of the debenture-holders. He gave notice of his appointment to the tenants and to the Crown:—

Held, that the rents in arrear in respect of property not specifically charged belonged to W. and H., but the rents of properties specifically mortgaged belonged to the debenture-holders inasmuch as they had taken possession by the appointment of a receiver and giving notice; that the drawbacks were only subject to the floating charge and could be dealt with by the company; and that, as the company had this power by their contract with the debenture-holders, the latter could not, with notice of the assignment, obtain priority to the assignees by giving notice to the Crown.

THE company Ind, Coope & Co., Limited, was incorporated in November, 1886. In the year 1890 the company created debenture stock to the amount of 500,000*l.*, which was ultimately increased under the provisions of the issue to 750,000*l.* This stock was called the A stock and was secured by debentures and by a trust deed dated September 12, 1890, by which the company specifically mortgaged to the trustees certain freehold and leasehold properties: the company was to hold the mortgaged premises for the purposes of its business until the security became enforceable; and by clause 28 "Nothing herein contained shall prejudice or affect the exercise by the company of the powers of leasing and agreeing to lease conferred upon mortgagors while in possession by the Conveyancing and Law of Property Act, 1881." The form of debenture was attached to the deed, and by clause 3 thereof "the company hereby charges with such payment its undertaking and all its property whatsoever and wheresoever both present and future including all uncalled-up capital for the time being." By clause 4 the charge was "to be a floating security so that the company in the course

of its business and for the purpose of carrying on the same may sell lease charge exchange or otherwise deal with the property for the time being of the company other than the property comprised in the indenture" of September 12, 1890.

In 1896 the company made a further issue of debenture stock, called the B stock, to the amount of 500,000*l.*, secured by a trust deed dated May 29, 1896. By that deed the company created a specific charge on certain freehold, leasehold, and other property described as "appropriated assets" not specifically charged by the deed of September, 1890; and also charged "in favour of the trustees or trustee the other assets for the time being of the company both present and future including its uncalled capital with the payment of all moneys for the time being owing on the security of these presents and such charge shall rank as a floating charge and shall accordingly in no way hinder or prevent the company from selling, alienating, mortgaging, charging, leasing, paying dividends out of profits, or otherwise disposing of or dealing with such assets in the ordinary course of its business." By clause 21 the company were to have power whilst in possession to make the leases therein specified.

In 1900 the company issued "irredeemable mortgage debenture stock" to the value of 1,000,000*l.*, known as I. M. D. stock. This was secured by a trust deed of September 18, 1900, which contained a specific mortgage in favour of the trustees of certain freeholds and leaseholds and a general charge on the "other assets for the time being of the company both present and future including its uncalled capital," and the charge was to "rank as a floating charge subject nevertheless to the existing debenture stocks and the securities for the same." No express power was given to the company to deal with its assets. In 1906 the company issued further securities called "premium bonds" secured by a charge which was to be "a floating security and to be subject to and rank after all charges or incumbrances whether fixed or floating heretofore created by the company."

By two indentures in similar form of August 1, 1908, and September 18, 1908, the company assigned to Messrs. M. M. Wilde and T. E. Honniball as trustees for the London City and

WARRINGTON J.
1911
IND, COOPE & CO., LIMITED, *In re.*
FISHER *v.* THE COMPANY.
KNOX *v.* THE COMPANY.
ARNOLD *v.* THE COMPANY.

Midland Bank, Limited, in consideration of the bank continuing an account with the company and granting it banking facilities and accommodation, certain book debts, including rents in arrear in respect of leases some of which were subject to the above-mentioned trust deeds, and also certain drawbacks owing to the company by the Excise authorities in respect of beer exported by the company on which the company was entitled to receive payments equal to the amount of the Excise brewing duty paid thereon. By two similar deeds of October 2, 1908, and November 27, 1908, the company assigned to Messrs. Wilde and Honniball other drawbacks of the same kind. On December 29, 1908, Messrs. Wilde and Honniball gave notice to the tenants from whom the rents were due and the shipping agents who had been employed by the company for exporting the beer that the debts in question had been assigned to them. They did not give notice to the Excise authorities.

On January 5 and 6, 1909, Messrs. A. F. Whinney, W. B. Peat, and D. Hill were appointed by the vacation judge receivers of the property comprised in the three trust deeds; and by an order made by Parker J. on January 15, 1909, in the three actions Mr. A. F. Whinney was appointed receiver on behalf of Mr. Fisher, representing the A debenture-holders, Mr. W. B. Peat receiver on behalf of Mr. Knox and the B debenture-holders, and Mr. D. Hill receiver on behalf of Mr. Arnold and the I. M. D. debenture-holders. Mr. Whinney was also appointed manager of the business of the company on behalf of all the debenture-holders. These appointments were expressly made without prejudice to the rights of the incumbrancers.

On January 6, 1909, Mr. Whinney received notice of the assignments to Messrs. Wilde and Honniball and gave notice of his own appointment to all the tenants of the company. Similar notices were given to and on behalf of the other receivers.

On January 7, 1909, notice of the receiverships was given to the Excise authorities.

Various amounts were due to shipping agents for freight; they claimed a lien on the drawback debentures and declined to assist in recovering the drawbacks until the freight had been paid.

Mr. Whinney therefore paid the freights in full and recovered some of the drawbacks. Questions arose as to the proper destination of the rents and drawbacks collected by him, and these three actions were brought with a view to ascertain the rights of the parties.

Cave, K.C., and *F. Whinney*, for the plaintiffs in the first action who represented the A debenture-holders. We as mortgagees have taken possession of the mortgaged property by the appointment of a receiver, and thereupon we became entitled to all the rents of that property which had accrued due, provided they were due under leases which were in existence when our security was created. The rents were part of the mortgaged property included in the specific charge: Coote on Mortgages, 7th ed. vol. i. p. 692; *Moss* v. *Gallimore* (1); Smith's Leading Cases, 11th ed. vol. i. p. 514; *Cook* v. *Moylan*. (2) The same principle applies to rents due under leases made by the mortgagor after the mortgage by virtue of a power given to him by the mortgage deed: *Rogers* v. *Humphreys*. (3) These leases were made under such powers contained in the deeds. The right to rent commences from the date of the security, not from the giving of notice: Foa on Landlord and Tenant, 4th ed. pp. 58, 165; but notice by an equitable mortgagee may not justify a tenant in refusing to pay the reversioner: *Hunt* v. *Duckworth*. (4)

The drawbacks are payable under the Inland Revenue Act, 1880, ss. 37, 38, 39. The Crown is the debtor, and the defendants gave no notice to the Crown, so the charge in their favour was not complete. We obtained the appointment of a receiver and gave notice to the Crown, so our charge takes precedence. Till that time these drawbacks were only included in our floating charge, but by giving notice we obtained priority. In fact there was no debt due from the Crown to which the assignments to the defendants could attach, for the Crown had a right to set off everything that was due to it. In order to get the papers from the shipping agents, who claimed a lien on them, the receiver

(1) 1 Doug. 279.
(2) (1847) 1 Ex. 67.
(3) 4 Ad. & E. 299.
(4) (1875) 39 J. P. 168.

WARRINGTON J.

1911

IND, COOPE & CO., LIMITED, *In re.*

FISHER *v.* THE COMPANY.

KNOX *v.* THE COMPANY.

ARNOLD *v.* THE COMPANY.

paid large sums for freight, and he is entitled to recover that payment before the defendants get anything.

Frank Dodd, for the plaintiffs in the second action, the B debenture-holders, and *G. D. Pepys*, for the I. M. D. stock-holders, plaintiffs in the third action, adopted the same contention.

T. H. Carson, K.C., and *H. Cassie Holden*, for Messrs. Wilde and Honniball. The arrears of rent and the drawbacks have been specifically assigned to us and we are entitled to them in priority to the plaintiffs. Arrears of rent are personal estate and are quite distinct from the property in respect of which they are due. A conveyance of Blackacre does not carry arrears of rent of Blackacre. The arrears of rent due on specifically mortgaged property are simply debts—choses in action of a personal nature—and under the contract between the plaintiffs and the company we have acquired a title to them and are not liable to be displaced by anything. At the date when these debts were assigned to us they were assets of the company subject only to the floating charges. The company had power to take the debts out of the floating charges and assign them to us, and did so. We are therefore entitled to all the arrears assigned to us, whether of property specifically charged or only included in the floating charge. It is not a question of landlord and tenant, but of the contract contained in the debenture trust deeds. Secondly, we submit that *Moss* v. *Gallimore* (1) and similar cases are obsolete. New powers have been given to mortgagors and the principle of those decisions is no longer applicable. The rule depended on implied authority given by the reversioner, the mortgagee, to the mortgagor. Now a mortgagor in possession can under s. 25, sub-s. 5, of the Judicature Act, 1873, and s. 10, sub-s. 1, of the Conveyancing Act, 1881, sue for the rents in his own name. Thus the mortgagor has a legal right to the rents, and the mortgagee is not the reversioner and cannot interfere. Here the company was the "person entitled" within s. 10—*Turner* v. *Walsh* (2)—and created, for value, a title in us to these arrears under its statutory powers. That title cannot be interfered with by the mortgagees. There is therefore no room for the application, in favour of the mortgagee, of the principle of *Moss* v.

(1) 1 Doug. 279.

(2) [1909] 2 K. B. 484, 496.

Gallimore (1) even if it is still in force: Carson's Real Property Statutes, 2nd ed. p. 573. At the date of the assignment to us the mortgagees had not taken possession or given notice of their intention to do so. These things were assigned to us for value, and it has never been decided that an assignee for value can be postponed to such a claim as this. In *Moss* v. *Gallimore* (1) the rival claim was by an assignee in bankruptcy; and he is not an assignee for value: *In re Anderson.* (2) As for the property subject only to the floating charges the company had power to give us a specific charge on the whole of it subject only to the floating charges: *Ward* v. *Royal Exchange Shipping Co.* (3) The fact that the deed securing the I. M. D. stock did not in terms give such a power to the company is immaterial, for the nature of a floating charge is well settled. It is "dormant"—*Governments Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (4)—and "ambulatory"—*Illingworth* v. *Houldsworth* (5)—and does not prevent a company from charging its assets. The order appointing the receivers was expressly made without prejudice to the rights of incumbrancers.

The drawbacks are merely debts due by the Crown to the company, and the company had a similar power to deal with them. Therefore we are entitled to them in priority to the debenture-holders. It is true that we did not give notice to the Crown, but the notice given by the debenture-holders did not give them priority, and the appointment of receivers altered no rights: *Ward* v. *Royal Exchange Shipping Co.* (3) If the Crown had any right of set-off it has not been exercised. The payment of freight was made in order to protect the property of the company; it was made without our knowledge, and the assignment to us remains undisturbed. The lien which it is sought to set up is a lien not on the goods in dispute but on collateral documents which have nothing to do with the title to the goods. It was not necessary to employ shipping agents, and they have no general right of lien: *Whinney* v. *Moss Steamship Co.* (6)

(1) 1 Doug. 279.
(2) [1911] 1 K. B. 896, 903.
(3) (1887) 58 L. T. 174, 178.
(4) [1897] A. C. 81, 86.
(5) [1904] A. C. 355, 358.
(6) [1910] 2 K. B. 813.

WARRINGTON J.
1911
IND, COOPE & CO., LIMITED, *In re.*
FISHER *v.* THE COMPANY.
KNOX *v.* THE COMPANY.
ARNOLD *v.* THE COMPANY.

The receiver and manager had no power to give them a lien as against us. So they have no lien by special contract, and common law lien for work and labour done only extends to the subject of the labour. There is no special custom relating to shipping agents.

Cave, K.C., in reply, referred to *Robbins* v. *Whyte* (1) and *Mutual Life Assurance Society* v. *Langley*. (2)

WARRINGTON J. stated the facts and, after holding that the absence from the trust deed of the I. M. D. stock of any express power for the company to deal with its assets was immaterial, proceeded: On January 5, 1909, receivers were appointed under each of the trust deeds, and on January 6 notice of the appointment of Mr. Whinney, who was the receiver on behalf of the first debenture stock-holders, and general receiver and manager of the other assets of the company, was given to all the tenants of the company. Similar notice was given by the receivers appointed specially for the B stock and the I. M. D. stock. On those dates I think I must take it that the mortgagees, through the receiver, put an end to the right of the company as mortgagor to receive the rents. The rents assigned by the two deeds of 1908 remained unpaid. Now those rents fall under two heads, first, rents payable in respect of premises specifically charged by one or other of the three deeds, and, secondly, rents payable in respect of property not specifically charged. With regard to the property not specifically charged, inasmuch as the trustees of the several debenture deeds were not mortgagees in the proper sense, they had no right to go into possession, they were not the reversioners expectant upon the leases and tenancies, and they, therefore, had no right to receive the rents in arrear. With regard to the rents, therefore, that were payable in respect of property not specifically charged I think Messrs. Wilde and Honniball are entitled to priority over the several debenture stock-holders.

But the position with regard to the properties specifically charged is different. The leases in all cases were granted subsequently to the mortgages, and the question with regard to

(1) [1906] 1 K. B. 125. (2) (1886) 32 Ch. D. 460.

these rents is whether by taking possession the mortgagees of the premises in respect of which the rents were payable did or did not become entitled to rents in arrear.

Now it was laid down as long ago as *Moss* v. *Gallimore* (1), which was decided in 1779, that the rent payable under a lease bearing date anterior to a mortgage is only received by the mortgagor in possession by leave and licence of the mortgagee; that the mortgagee is the reversioner expectant on that lease, and if by going into possession he puts an end to the leave and licence under which the mortgagor collects and receives the rents, he is entitled to the rent payable in respect of the mortgaged premises; whether that rent became due prior to or after the date of his going into possession it is payable to him as reversioner.

In *Rogers* v. *Humphreys* (2) the same principle was applied to the case of a lease created subsequent to the mortgage by virtue of a power by the mortgage deed conferred upon the mortgagor, and for the same reason, namely, that the lease created under the power conferred on the mortgagor was something carved out of the estate of the mortgagee, and that the estate of the mortgagee was the reversion which was expectant on that lease. In that case, therefore, the principle enunciated in *Moss* v. *Gallimore* (1) was applied, and it was held that on going into possession the mortgagee was the person who was entitled to rents in arrear. Applying that principle to the present case, so far as the specifically mortgaged premises are concerned, inasmuch as all the leases were created either under statutory power, or under power expressly given by the mortgage deed, the decisions in those cases to which I have referred would apply, the rents in arrear would be in fact part of the specific charge, and, therefore, not within the power of the company to assign in priority to the trustees for the debenture-holders, because that power only extends to property not comprised in the specific charge. But it is said that the principles of *Moss* v. *Gallimore* (1) and *Rogers* v. *Humphreys* (2) do not apply at the present day, that they have been in fact overruled or set aside by subsequent legislation, and reliance is placed on the 25th section of the

(1) 1 Doug. 279. (2) 4 Ad. & E. 299.

WARRINGTON J.
1911
IND, COOPE & CO., LIMITED, *In re.*
FISHER *v.* THE COMPANY.
KNOX *v.* THE COMPANY.
ARNOLD *v.* THE COMPANY.

Judicature Act of 1873, sub-s. 5, and the 10th section of the Conveyancing Act of 1881. In my opinion those two provisions do not in any way alter the rights of the parties as they were established at common law. I think that all those sections do is to create a mode of procedure, certainly as regards the Judicature Act, and, I think, also as regards the Conveyancing Act; but they were not, in my opinion, intended to affect the right of the mortgagee as the reversioner expectant on leases created either before the date of his mortgage or after that date in pursuance of a power contained in it. It seems to me that the principles to which I have referred are still in force, and that, therefore, the rents in respect of property comprised in the specific mortgage belong now to the trustees for the debenture-holders notwithstanding the attempted assignment of those rents to the respondents Messrs. Wilde and Honniball. As I have already said, the rents payable in respect of that property which was only subject to a floating charge will be payable to Messrs. Wilde and Honniball.

I now come to the question of drawbacks. The drawbacks are certain sums due from the Customs authorities to Messrs. Ind, Coope & Co., and they arise under the Inland Revenue Act of 1880. Sect. 36 of that Act provides that "On and after the 1st day of October, 1880, there shall be allowed and paid in respect of beer which shall be exported from the United Kingdom to foreign ports as merchandise, or shipped for use as ship's stores, a drawback calculated according to the original gravity thereof," at certain rates. Messrs. Ind, Coope & Co. shipped through shipping agents a large quantity of beer for foreign ports and became entitled to the drawback mentioned in s. 36 of that Act. The Act provides certain machinery by means of which this drawback can be recovered. The person intending to export the beer is to produce a declaration containing certain facts with regard to the beer which he proposes to export. He is also to give a notice to the Customs officer containing specific facts relating to the packages which are to be exported, and the amount of the drawback claimed. Then by s. 39 the officer of Customs is to indorse on the notice so given a certificate of the quantity of beer actually exported, and at the expiration of a month from the date of that certificate

he is to deliver to the exporter, or his agent, a debenture in the prescribed form specifying the amount of the drawback payable in respect of the beer. Then that debenture must be presented to the collector with a declaration indorsed thereon containing the prescribed particulars signed by the exporter, and the collector is thereupon to pay to the exporter the amount specified in the debenture. The point of that is that the amount of the drawback becomes, when the proper formalities have been observed, a debt due from the Crown to the exporter, in this case Messrs. Ind, Coope & Co. Now Messrs. Ind, Coope & Co. assigned that debt to the trustees for their bankers. Prima facie that assignment would take priority of the debentures because it was executed while the debentures were still a floating charge, and while the company had the express power given to them by the first two of the debenture trust deeds. But the assignees did not give notice of their assignment to the Crown authorities; they gave notice to the shipping agents, but the shipping agents were not the debtors. The receiver, on taking possession, did give notice to the Crown authorities, having at that time knowledge of the previous assignments to the bank. It is now contended on behalf of the debenture-holders that they are entitled to priority over the assignments to the bank by reason of their prior notice to the debtor, namely, the Crown. If there had been nothing more in the case than a charge covering these particular debts prior in date, and I only had to determine which of two assignees had priority, I should have to determine according to well-known principles of equity that those who first give notice to the debtor would have priority over the other assignee though his assignment was prior in date. But that is not the case. Here I have a floating charge, prior in date to the specific assignment, but containing an express stipulation authorizing the company subsequently to its date to create a charge which notwithstanding that fact should have priority over it. The point has been actually decided by Chitty J. in the case of *Ward* v. *Royal Exchange Shipping Co.* (1) The statement of the facts in the report is not at all a satisfactory one, but the judgment is a reserved judgment. Chitty J. stated in that judgment facts which do not otherwise

(1) 58 L. T. 174, 178.

WARRINGTON J.
1911
IND, COOPE & CO., LIMITED, *In re.*
FISHER *v.* THE COMPANY.
KNOX *v.* THE COMPANY.
ARNOLD *v.* THE COMPANY.

appear in the report, and there is no question at all what his view of the circumstances was. In that case there were debentures creating a floating charge giving power to the company to deal with its assets in the ordinary course of its business, just as here. In the ordinary course of its business the company had created a specific charge on certain freight, but the assignees, the persons entitled to that charge, had not given notice to the debtor, again exactly as here. Now this is what Chitty J. said: "It is further contended by the respondents that the holders of debentures and debenture stock obtained priority over Messrs. Harrison"—they were the specific assignees—"by reason of their having given the first notice to the consignees." Then he deals with certain facts which are immaterial, but on which he held that there was in fact nothing on which the parties could rely. Then he goes on, "But assuming that the view I take of the correspondence is too favourable to Messrs. Harrison,"—that means assuming the view I take that there was not notice is not the correct one, and there was notice—"there would still remain the question whether the holders of debentures and debenture stock could, as a matter of law, obtain priority over them by giving the first notice to the consignees. It appears to me they could not. The effect of the stipulation already stated, as to the security of the debentures and debenture stock being a floating security only, was to reserve to the extent already stated a power to the company to give a security on a particular asset in priority to the debentures and debenture stock. By virtue of this resolution Messrs. Harrison had priority at the time when they gave notice to the receiver of their security, namely, the 6th of January, 1887, which was before the receiver gave notice to the consignees. The result is that Messrs. Harrison had priority by virtue of the contract on the part of the holders of debentures and debenture stock in the company. If at the time when he advanced his money a mortgagee of a chose in action has notice of an existing mortgage, he cannot by giving the first notice to the debtor obtain any priority. If a charge were given on a debt with power for the mortgagor, notwithstanding the charge, to raise certain sums for certain defined purposes on the security of the debt in priority to the charge, and the power were exercised and

notice of the subsequent advance were given to the persons entitled to the charge, the person so entitled could not gain priority by giving the first notice to the debtor, and for this simple reason, that he had contracted that the subsequent advance should have priority." That is to say that here the debenture-holders have contracted by the terms of their debentures, or by the terms of their trust deeds, that a charge created on the specific parts of the property shall have priority over the debentures, and they are, therefore, not at liberty to displace that priority by being first in the field to give notice to the debtor. That case seems to me to have decided the precise point which is before me now, and I must follow it. The result is, therefore, that subject to two further points, which I am about to notice, the drawbacks in question are payable to the respondents Messrs. Wilde and Honniball.

There are two further points which are taken on behalf of the debenture-holders. One of those is this: At the date when Mr. Whinney was appointed receiver and manager a large sum of money was due from the company to the Crown in respect of duty. The Crown were threatening to distrain for that sum. If they had so distrained it would, of course, practically have put an end to the business of the company which Mr. Whinney was carrying on on behalf of everybody entitled. Accordingly, to avoid any hostile proceedings on the part of the Crown, he paid the full amount of the duty, amounting to something over 32,000*l.*, and he says now the Crown were entitled to set off the drawbacks against this duty; there was in fact, therefore, no debt due from the Crown at all in respect of the drawbacks, and the amount of the drawbacks must be paid to Mr. Whinney in part payment of the 32,000*l.* which he paid for duty. In my opinion that contention is ill-founded. Mr. Whinney had the right to set off the drawbacks against the duty; he did not exercise that right; he paid the duty to the Crown in full, and the debt due from the Crown in respect of the drawbacks remains; it was always a debt notwithstanding the company owed them a larger sum, and that debt, such as it was, passed to the assignees. Whether notwithstanding that assignment he could have set off if he had desired to do so, and deducted it from

WARRINGTON J.

1911

IND, COOPE & CO., LIMITED, *In re.*

FISHER *v.* THE COMPANY.

KNOX *v.* THE COMPANY.

ARNOLD *v.* THE COMPANY.

the amount of duty payable, may be a very serious question, but he did not attempt to do it, and it seems to me, notwithstanding the fact that there was duty payable to the Crown, the debt in respect of the drawbacks existed and belonged to the assignees.

There is still a further point, and as to that I am not now in a position to give a decision, because we do not know the facts. The point arises, as I gather, in this way. Shipping agents conducted for Ind, Coope & Co. the business relating to these drawbacks, and it was alleged, though at present it is not proved, that they had possession of the documents necessary to recover the drawbacks; that they claimed a lien on these documents for freight due to them; that Mr. Whinney paid the freight and is entitled, in order to acquire these documents, and in order himself to recover the drawbacks, to be credited with the amount so paid before he pays over to the assignees the amount of the drawbacks recovered from the Crown. With regard to that the matter must stand over for either proof of the actual facts, or to have the statement of facts amended, but subject to that I hold that Messrs. Wilde and Honniball are entitled to these drawbacks as they are to the rents which are derived from premises not specifically charged. There will be no order drawn up at present; the rest of the matter had better stand over for an amendment of the statement of facts, or, if there is any dispute, for evidence.

Solicitors: *Davidson & Morriss; Burn & Berridge; Nash, Field & Co.; Alfred Allistone.*

H. C. R.

HAYNES *v.* FORD.

C. A.
1911
April 27.

[1910 H. 1339.]

Market—Statutory Market—Disturbance—Warehouse—Shop.

The Southwark Borough Market was founded by a local Act of the reign of George II., and by an amending Act passed two years later it was provided that if any poulterer, country chapman, victualler, gardener, fruiterer, fish-seller, or any other person, should sell or expose for sale by way of hawking or otherwise any poultry, fish, fruit, herbs, oatmeal, or other victuals or provision whatsoever, in any private house, lane, alley, inn, warehouse, street, stall, common passage, or other place whatsoever, within 1000 yards of the market, but only in his own shop or shops, or in the public market place, he should be liable to a penalty. In modern times the market had become a fruit and vegetable market only, and the business carried on there was wholesale. A former salesman at the market obtained a lease of a large four-storeyed building fronting the market. He used the ground floor for the sale of fruit and vegetables, the second and third floors for the storage of goods intended for immediate sale and for the ripening of bananas, and the fourth floor for domestic purposes. The business which he carried on on these premises was a wholesale business, and he sold goods on commission as well as goods of his own.

In an action by the market authorities for an injunction to restrain him from carrying on this business:—

Held, that the defendant was carrying on business in his own shop within the meaning of the Act and that the action failed.

Decision of Neville J., [1911] 1 Ch. 375, affirmed.

Appeal from a decision of Neville J.

The action was brought by the trustees of the Southwark Borough Market in the name of the plaintiff to restrain the defendant from establishing or carrying on any market or selling any goods or commodities within 1000 yards of the Southwark Borough Market without a proper licence from the trustees of the said market, contrary to the provisions of the Borough Market, Southwark, Acts, 1754 to 1892, and of the London Government Scheme (Southwark Borough Market) Confirmation Act, 1907.

The Southwark Market was originally founded by a charter of Edward VI. granting the manor of Southwark to the Corporation of London, and, as incident to the said manor, a right to hold a

C. A. 1911 HAYNES v. FORD.

market on four days in the week. This grant was confirmed, after the fire of London, by an Act of Parliament, 29 Car. 2, c. iv., and the market was held in the High Street until 1754, when, the High Street having become a great centre for coaching traffic, the market had become a nuisance. In that year an Act, 28 Geo. 2, c. ix., was passed abolishing the old market and enacting that no market should for the future be held in the High Street, nor any stall placed there.

In the same year by an Act, 28 Geo. 2, c. xxiii., after reciting that a market was necessary and that the churchwardens, overseers, and inhabitants of the parish of St. Saviour within the said Borough had found a site for the said market, commissioners were appointed to set out the site of the new market, and the churchwardens and overseers of the poor of the said parish together with eleven of the inhabitants chosen by the vestry, or any seven of them, were empowered to purchase the land and enjoy the right of holding the said market for the Borough of Southwark upon the land purchased, and to receive and take the usual and accustomed rents, tolls, and profits thereof in as full and beneficial a manner as the same were at any time enjoyed by the Corporation of London, and the Act contained the following clause, which was referred to as s. 4, though not numbered in the original.

4. "And for preventing any encroachments which might hereafter be made on the said market, be it further enacted by the authority aforesaid that from and after the said ground shall be purchased and used as a market, it shall not be lawful for any person or persons to erect or hold any other market within the said Borough of Southwark, or any part thereof, or to vend or expose to sale any fish, meat, poultry, or other provisions, which are usually sold in publick markets, in any stall in any high street of the said Borough of Southwark, or within the space of 1000 yards from the bounds of the said market, within the county of Surrey, except the present hay market for sale of hay and straw only, without license under the hands and seals of the said churchwardens, overseers, and inhabitants, or any seven or more of them, first had and obtained."

An amending Act was passed two years afterwards, 30 Geo. 2,

c. xxxi., which contained the following clauses, referred to as ss. 9 and 10:—

9. "And be it further enacted by the authority aforesaid, that from and after the passing of this Act, if any butcher, or other person, shall sell, utter, or set to sale, any manner of flesh, or other raw victuals, upon or within any stall, shop, cellar, or window, of any house within the said Borough, not being the owner or occupier of all the said house, every such person being thereof convicted, upon the oath of one or more witness or witnesses, before any one or more justice or justices of the peace for the county of Surrey, or for the said Borough shall, for every such offence, forfeit and pay the sum of 40*s*., one moiety whereof shall be paid to the informer or informers; and the other moiety shall be paid and applied to the use of the poor of the parish where the offence shall be committed."

10. "And be it further enacted by the authority aforesaid, that from and after the passing of this Act, if any poulterer, country chapman, lader, kidder, victualler, gardener, fruiterer, fish-seller, or any other person or persons, shall sell, utter, or put to shew or sale by way of hawking, or as a hawker, or otherwise, any beef, mutton, lamb, veal, pork, poultry, butter, cheese, fish, fruit, herbs, oatmeal, or other victuals or provision whatsoever in any private house, lane, alley, inn, warehouse, street, stall, common passage, or other place or places whatsoever, within 1000 yards of the said market within the county of Surrey, but only in his, her, or their own shop or shops, or in the publick market place in the said recited Act and this Act described, and in market time only" [then followed the same penalty as before.]

Several other Acts were passed from time to time for regulating the market, and the London Government Scheme (Southwark Borough Market) Confirmation Act, 1907 (7 Edw. 7, c. xlvi.). established an entirely new body of trustees; but the plaintiff's claim in this action was founded upon the clauses in the two Acts of George II.

At the present time the market was used solely as a fruit and vegetable market; it was a continuous market in the sense that it was open on every working day, and there were no fixed

C A. 1911 HAYNES v. FORD.

market hours; and the selling was mainly, if not exclusively, wholesale; there was no selling by auction.

The defendant had from 1885 to the end of 1909 carried on business as a salesman in the market. At the end of 1909 the defendant acquired a lease for twenty-one years of a large building called New Hibernia House, in Winchester Street, Borough Market. Winchester Street bounded the market on one side, and the building was opposite to one side of the market and far within the 1000 yards limit. The building was of four storeys. The ground floor was separated from the street by arches which were open to the street during business hours but closed by revolving shutters at other times. The ground floor, except a small part partitioned off for an office, was used for the sale of vegetables and fruit. The second and third floors were used as warehouses for the storage of goods chiefly intended for immediate sale, but a certain portion was set apart for ripening bananas. The fourth floor was used wholly for domestic purposes and was occupied by the defendant and his son for some days in every week.

The business carried on by the defendant on these premises was that of a wholesale fruit broker and potato factor. The defendant dealt in the same classes of goods as were sold in the market, and he sold goods on commission as well as goods of his own, but he sold a larger proportion of his own goods than of goods on commission. It was admitted that this was practically the same business as he had carried on at stalls in the market. The defendant still sold in the market for the owners similar goods from the carts or waggons in which they were sent up and which had obtained a standing place, and for these he paid toll. It was admitted that for many years buildings of a similar nature to that of the defendant had been erected in the immediate vicinity of the market and within 1000 yards thereof, and that in these buildings business was carried on in the same way as the defendant carried on his business, without any licence from the market trustees and without their raising any objection.

Neville J. held that the defendant was carrying on business in his own shop within the meaning of the exception in s. 10 of 30 Geo. 2, c. xxxi., and he dismissed the action.

The plaintiff appealed.

Astbury, K.C., Macmorran, K.C., and *Bischoff*, for the appellant. 1. The defendant is carrying on a rival market within s. 4 of 28 Geo. 2, c. xxiii. 2. He is selling otherwise than in a shop within the prohibition in s. 10 of 30 Geo. 2, c. xxxi. As to 1, although the statute contains no express prohibition against interference with the plaintiff's market rights, that is implied from the prohibition against holding a rival market. Under the latter prohibition the Court will refuse to sanction anything which amounts to a disturbance of the market: *London Corporation* v. *Low*. (1) The business which the defendant is carrying on, if not the holding of a rival market, is at least an interference with the plaintiff's rights; and as regards disturbance it is immaterial whether the market is an ordinary franchise market or a statutory market: *Birmingham Corporation* v. *Foster*. (2) It is therefore unnecessary to consider whether this market is a new market or a continuation of an old one. As to 2, a shop in this context cannot include a place where the business is substantially the carrying on of a rival market. The defendant here does everything which is done in the market. He sells the same goods, at the same hours, in the same way, to the same people; his business premises are in the immediate precincts of the market, and he takes advantage of the concourse of people frequenting the market. The market is a wholesale market in the sense that the goods are mainly sold wholesale. The defendant also sells wholesale. He describes himself as a wholesale fruit broker and potato factor. He sells goods on commission as well as goods of his own, and the sale of goods on commission is one of the many elements which go to make up a rival market, as distinguished from selling in a shop: *Fearon* v. *Mitchell* (3); *Wilcox* v. *Steel* (4); *Dorchester Corporation* v. *Ensor* (5); *Manchester Corporation* v. *Lyons*. (6) In *Fearon* v. *Mitchell* (3) it was held that an auctioneer's premises were not a shop within s. 13 of the Markets and Fairs Clauses Act, 1847, and that the defendant

(1) (1879) 28 W. R. 250.
(2) (1894) 70 L. T. 371.
(3) (1872) L. R. 7 Q. B. 690, 699, per Lush J.
(4) [1904] 1 Ch. 212, 222, per Romer L.J.
(5) (1869) L. R. 4 Ex. 335, 341, per Channell B.
(6) (1882) 22 Ch. D. 287, 307, 309, per Jessel M.R. and Cotton L.J.

C. A. 1911 HAYNES v. FORD.

was holding a rival market. But the Court did not rely so much upon the fact that the business carried on on the defendant's premises was an auctioneer's business as upon the extensive area of the premises, and the sale of marketable goods thereon in the same way as the goods were sold in the market. There the market was an auction market, but here the sales are not by auction, and there is here the setting up of a rival market by the defendant within the principle of that decision. The question whether or not the sales are by auction is not the test of whether the premises are a shop: *McHole* v. *Davies*. (1) The only difference between the defendant's business and that carried on at the market is the absence of the concourse of sellers, but a concourse of sellers is not essential to the establishment of a rival market: *Elwes* v. *Payne*. (2) The exception in s. 10 of 30 Geo. 2, c. xxxi., was intended to cover ordinary sales across the counter of a man's own goods in his own shop; it was not intended to include a large wholesale business such as that carried on by the defendant. The defendant's building is a warehouse within the meaning of s. 10. The term "warehouse" is not confined to a place for the storage of goods, apart from sale.

[KENNEDY J. In 1751 it was held that "warehouses" meant "not mere repositories for goods, but such places where merchants and other traders keep their goods for sale in the nature of shops, and whither customers go to view them": *Howard's Case* (3); and that was followed in 1783 in *Godfrey's Case*. (4) See the definition of "warehouse" in Stroud's Judicial Dictionary, 2nd ed. vol. iii. p. 2211.]

Those decisions are important as being contemporaneous expositions of the meaning of the term, and they support the view that the defendant's place of business is a warehouse as distinguished from a shop where goods are sold retail across the counter. What the defendant is doing is prima facie a disturbance of the market, and it is for him to bring himself within the exception. If this practice is allowed to continue the market will be reduced to an absurdity.

(1) (1875) 1 Q. B. D. 59.
(2) (1879) 12 Ch. D. 468, 473, per Jessel M.R
(3) (1751) Foster, 77.
(4) (1783) 1 Leach, 287.

Buckmaster, K.C., Peterson, K.C., and *Sargant*, for the respondent. The question turns wholly upon the construction of ss. 9 and 10 of 30 Geo. 2, c. xxxi., and the question of the general disturbance of market rights is not relevant. Sect. 9 has reference to a particular class of trade, namely, the sale of meat, which it contemplates will be carried on under cover, and, in substance, it provides that no one shall carry on the trade of a butcher within the Borough in any stall or shop unless he owns or occupies the whole house. That section has no application to the present case. Sect. 10 deals with a different class of trade and is aimed at the itinerant vendor. The words "country chapman," "lader," and "kidder" at the commencement of the section are analogous terms and are used, broadly speaking, in the sense of huckster (see Murray's Oxford Dictionary). The section was intended to prohibit hawking and it contemplated the possibility of the hawker hiring a room at an inn or a private house or a warehouse for the sale of his wares.

[KENNEDY L.J. The definition of "hawker" in Stroud's Judicial Dictionary, 2nd ed. vol. ii. p. 854, includes "a person who goes from the town in which he resides and takes a room at another town and there sells goods which are brought direct from the town of his residence," and *Manson* v. *Hope* (1) is cited in support of that statement.]

The section was not intended to prevent a man from carrying on business in his own shop, and the exception was meant to take out of the prohibition something which might otherwise be covered by the earlier words. The question, therefore, is, Is this place where the defendant carries on business a shop? "Shop" is defined by Johnson as "a place where any thing is sold," and "warehouse" is defined by him as "a storehouse of merchandise." A warehouse is not a place where goods are sold, but a place where goods are stored, and it was included in the section to prevent the hawker from selling from there. But whatever the definition of warehouse, whether it be simply a place for storing goods, or whether it be not merely a repository for goods but also a place where a trader keeps his goods for sale, if it is a shop the defendant is exempt; and a place may be none the less

(1) (1862) 31 L. J. (M.C.) 191.

C. A. 1911 HAYNES v. FORD.

a shop because it is also a storehouse: *Pope* v. *Whalley*. (1) There is no foundation for limiting a shop to a place where goods are sold across the counter. Those words of course cannot be taken literally and must mean a place where goods are sold in small quantities at retail prices; but a shop may include a place where goods are sold wholesale: *Manchester Corporation* v. *Lyons*. (2) "Wholesale" only means selling in large quantities, but neither the quantity of the goods sold nor the purpose of the buyer can enter into the question of what is a shop. There is nothing in the definition of a wholesale trader to prevent him from dealing with any person he chooses. It is said that this is a wholesale market, but originally it must have been a retail market, because it was substituted for sales in stalls in the streets, and the important consideration is not what the market does do, but what it can do. The construction of the section does not depend upon the particular manner in which the market authorities have chosen to encourage particular forms of trade.

Then it is said that this is not a shop because the defendant's trade consists partly of the sale of goods on commission, but in *Fearon* v. *Mitchell* (3) Cockburn C.J. thought that the stables of a horse-dealer where he kept horses for sale either as his own or on commission might be a shop within the exception in s. 13 of the Markets and Fairs Clauses Act, 1847. If the defendant is selling in his shop within the statutory exception the fact that what he is doing might otherwise have been a disturbance of the market is immaterial: *Abergavenny Improvement Commissioners* v. *Straker*. (4) The modern tendency is to construe these statutory markets strictly, otherwise trading would become impossible within the whole of the prescribed area.

Astbury, *K.C.*, in reply. There is no case which decides that a place where the business carried on is exclusively wholesale can be a shop. In *Manchester Corporation* v. *Lyons* (2) the business was partly wholesale and partly retail.

COZENS-HARDY M.R. This is an appeal from a decision of Neville J., who has dismissed an action in which the plaintiffs

(1) (1865) 6 B. & S. 303, 313.
(2) 22 Ch. D. 287, 306.
(3) L. R. 7 Q. B. 690, 695.
(4) (1889) 42 Ch. D. 83.

as trustees of Southwark Market seek an injunction in substance to restrain the defendant Ford from carrying on business in a building (I use a neutral word for the moment) in immediate contiguity to the market in which he is selling goods of a similar nature and kind to those which are sold in the market.

Now, in order to consider the rights of the parties, I think it is important to clear some propositions away. This is not an ancient market having prescriptive rights to restrain people from selling in their own shops. There was an ancient market which may or may not have had prescriptive rights of that nature, but that ancient market, which was vested in the Corporation of London, was abolished in the reign of George II., and a new statutory market was granted to new grantees, and the statutes establishing the market contain express provisions with a view of protecting shopkeepers. The question before us does not involve, in my view, a consideration of the numerous authorities defining the precise rights of the holders of franchise markets, and defining what amounts to a disturbance of such a franchise market, but the question here is, Aye or No, is Mr. Ford liable to a penalty under s. 10 of the Act, which I shall read in a moment? If he is liable to a penalty and might be sued for a penalty before the proper tribunal, it is plain that the plaintiff is entitled to an injunction to restrain him from doing that which by Act of Parliament is made illegal; if, however, he is not liable to a penalty, if he is doing that which the proviso says a man may do, it is, in my opinion, quite clear that the plaintiff cannot succeed on the ground that what Mr. Ford is doing is damaging to the market, and would in the case of a franchise market afford a ground for the interference of the Court.

The only question, therefore, in my view turns upon the true construction and effect of ss. 9 and 10 of the Act of George II., which I must now refer to in more detail. It is manifest from this Act that the prime reason why the ancient market was got rid of was that there was an obstruction in the public highway—stalls and goods which were near this market obstructed the public highway—and Parliament thought that

C. A. 1911 HAYNES v. FORD. Cozens-Hardy M.R.

that should be put a stop to and it was put a stop to, and, under powers conferred by this Act and enlarged by subsequent Acts of Parliament, a large space of ground with very large buildings erected upon it is now to be seen in Southwark. There is also to be seen—and I only mention this by the way and not as influencing my judgment—in the immediate neighbourhood some thirty-one shops of the nature of that which is in question here, not identical in all respects very possibly with it, and no one of them quite so big or so important as Mr. Ford's, but that is the state of things which has been going on roughly for the last fifty years.

The Act of Parliament, 30 Geo. 2, c. xxxi., in s. 9, deals with one particular class of persons. Mr. Buckmaster has called our attention to a recital in the Act which seems to me to throw a great deal of light on s. 9, because the recital says this: that the trustees did cause buildings erected on ground which they had acquired to be taken down and the ground to be made part of the area of the intended market "with a view of erecting divers new dwelling-houses there for the accommodation of the butchers and others, exposing or intending to expose provisions and other goods to sale therein." The trustees of the market had therefore erected, on the market premises, dwelling-houses for the express purpose of accommodating butchers and others exposing or intending to expose provisions and goods for sale therein. Then comes s. 9, which says this: "From and after the passing of this Act, if any butcher, or other person, shall sell, utter, or set to sale, any manner of flesh, or other raw victuals, upon or within any stall, shop, cellar, or window, of any house within the said Borough, not being the owner or occupier of all the said house, every such person being thereof convicted" shall be fined. That was obviously, I think, a limited protection extending to the whole Borough, not merely to within 1000 yards of the market. The section says that no butcher or other person may carry on business within the Borough except in a shop of the whole of which he is the owner or occupier. I do not doubt that provision would apply to a sausage seller, who could not properly be termed a butcher, and I can conceive various

other persons who would come within it; but that section obviously does not apply to anything that Mr. Ford is doing; it is quite plain that the words "or other person" there mean other person ejusdem generis with butcher.

Then we come to s. 10, the language of which is peculiar. It says: "And be it further enacted by the authority aforesaid, that from and after the passing of this Act, if any poulterer, country chapman, lader, kidder"—we have had those words explained to us and I have come to the conclusion that the words "country chapman," "lader," and "kidder" are words describing substantially the same class of person, that they are really local names for what is generally known perhaps as a country chapman or higgler—"if any poulterer, country chapman, lader, kidder, victualler, gardener, fruiterer, fish-seller, or any other person or persons, shall sell, utter, or put to shew or sale, by way of hawking, or as a hawker, or otherwise, any beef, mutton, lamb, veal, pork, poultry, butter, cheese, fish, fruit, herbs, oatmeal, or other victuals or provision whatsoever, in any private house, lane, alley, inn, warehouse, street, stall, common passage, or other place or places whatsoever, within one thousand yards of the said market," then he is liable to a penalty. Then it goes on "but only in his, her, or their own shop or shops, or in the publick market place." Now I think it is reasonably plain that the general scheme of s. 10 was to protect the market against what I may call itinerant vendors, and that the section was intended to prevent them from selling in the open air, in the lanes, alleys, stalls, common passages, "or other place or places whatsoever," which I take it would mean open places, and also from selling in a room at an inn, or a warehouse which they might hire for the purpose. It would be no excuse for the hawker to say "I have come up on my cart from Kent and I will hire a room in an inn and sell my goods there," or "I will hire a room in a warehouse, and there I will sell my goods." That is all hit at. Then comes the express saving, which is not merely an express saving, but ought to be construed as an express permission, that this section does not apply to any person or persons selling in his, her, or their shop or shops. In other words, the whole question for us is this: Is what Mr. Ford is doing, selling in his own shop,

C. A. 1911 HAYNES v. FORD. Cozens-Hardy M.R.

within the permission given by s. 10, or is it a sale in a warehouse which is prohibited by the former part of the section; or (if you like to put it so high), is this a case taken altogether out of the section on the ground that it is the establishment of a rival market?

In my opinion this is a shop as distinct from a warehouse, and it is none the less a shop because there was a warehouse accessory to the shop and used for supplying the shop with the goods which are sold. As was stated in *Pope* v. *Whalley* (1), the true definition of a shop means a place not only for selling, but for storing. It plainly does; one cannot go into any shop without seeing that. Nor is it any the less a shop because the place where the goods designed for selling in the shop may be in a back yard or anywhere else. But then it is said that this is not a shop because "shop" implies retail sale. It was first said "retail" sale only, and next it was said retail sale at least to some extent. I do not understand how that can be made out. The market, by usage of late years, has been limited, we are told, and I have no doubt accurately, to wholesale dealing, and not to retail dealing, and the shops round have, I gather, followed the same course; but, in my opinion, a shop is none the less a shop because the person keeping the shop elects not to sell small quantities to the chance customers who come in, but to supply other persons who themselves act thereafter as retailers in small quantities to small buyers.

Then it is said that this is not a shop because the goods are not solely the property of Mr. Ford, but are partly his own goods of which he is absolute owner, and partly goods which he sells on commission. Again I say, why should not that be so? Nothing is more common than to have goods sold in shops on commission; and if authority were wanted for that proposition, the passage which has been read from the judgment of Cockburn C.J. in *Fearon* v. *Mitchell* (2) amply covers this. He says that because a horsedealer keeps in his stable horses which are partly his own and partly for sale on commission, that would none the less be considered to be a shop within the meaning of the statute to which he was there referring.

(1) 6 B. & S. 303, 313.

(2) L. R. 7 Q. B. 690, 695.

Then it is objected that this is a very large building. It is, I think, four storeys high, and it is a building which has been erected at large cost and in respect of which a very heavy rent is payable by Mr. Ford. No doubt it is true that in the reign of George II. establishments such as Whiteley's, Harrod's, and Selfridge's were beyond the contemplation of man; but the size of the shop cannot really be a relevant matter for us to consider. If a man may carry on business here in a small shop I can see no reason why he should not have full liberty to carry on business in a large shop. As Blackburn J. says in the case of *Pope* v. *Whalley* (1), if this were a permanent private shop the penalty could not be enforced. Only one answer can be given to the question whether this is a permanent private shop. It is none the less a permanent private shop because the goods which are sold there wholesale to persons who come to buy are also stored upon the premises, and in that sense it is used as a warehouse. It is not a warehouse in the sense of storing goods for safe custody belonging to other persons; it is a warehouse only in the sense that it is a building used for storing the goods for sale in the shop, for feeding the shop with the goods intended thus to be consumed. In my opinion it is none the less a shop because it is large; it is none the less a shop because it is wholesale; it is none the less a shop because goods are partly sold on commission, and of course it is none the less a shop because it is in the immediate neighbourhood of the market.

For these reasons (which in substance do not differ from those given by Neville J.) I think that the decision appealed from was perfectly right, and that this appeal should be dismissed with costs.

Buckley L.J. The decision in this case turns upon the true construction of that which has been called s. 10 of the Act of 30 Geo. 2, c. xxxi. It is true that the provisions of the Act of 28 Geo. 2, c. xxiii., had contained words forbidding the erection or holding of any other market within the Borough of Southwark or any part thereof, but nothing to my mind turns upon that section. I have not to consider whether Mr. Ford's premises would constitute another market for this reason,

(1) 6 B. & S. 303, 312.

C. A. 1911

HAYNES v. FORD.

Buckley L.J.

that the subsequent statute, 30 Geo. 2, c. xxxi., has authorized the acts which he does if his premises are his own shop or shops.

For the purposes of the construction of this s. 10, it seems to me there are two matters which it is desirable to bear in mind. The first is, that the section is one which imposes a penalty, and, for the purpose of construing the section, I must construe it in exactly the same way as if this were a proceeding for a penalty; and if it were a proceeding for a penalty, the onus would be on the person who said that the penalty had been incurred to shew that, plainly within the Act of Parliament, there had been done an act which was forbidden, so that there rests with the plaintiff in this case the onus, as it seems to me, of shewing plainly that that which Mr. Ford is doing is a thing forbidden by the Act.

The other relevant consideration is that the acts forbidden are not confined to acts done in the immediate vicinity of the market; the section extends to 1000 yards away from the market; so that any argument founded upon the injurious effect on the market of the establishment of this business immediately opposite may be dismissed, because, if Mr. Ford's shop were 999 yards away, the construction of the section must be the same as if it was immediately adjacent to it. Bearing in mind those two matters, it remains to come to the words of the section. The question I have to determine is, Are Mr. Ford's premises a shop within the meaning of the word "shop" as used in this section? In defining what "shop" means in this section regard must be had to the context. I find that the section forbids the various acts enumerated in the section in any one of eight named places, or in any other place whatsoever. The eight named places may be summarized thus: four of them are open streets; the words are "lane, alley, street, and common passage." Another, a fifth, is "stall." A stall may be in a street or may be in a shop, but in this section I think it is a stall in a street, because it is contrasted with a shop. I have therefore five places which are open-air places. So far it would seem that what is being aimed at is the itinerant trader, the casual person who has not a permanent establishment by way of a warehouse or shop in a building, but a person who is an itinerant trader who comes to

sell his goods in the street. Beyond those five there are three others, and the three are private house, inn, and warehouse. These are all, not streets or open-air places, but buildings. I have to consider what "warehouse" presumably means in this context. A private house and an inn are places in which you would not contemplate that sales would be made. I am not referring to sales of meals—provisions to be consumed on the premises. Putting that aside, in a private house or an inn you would prima facie not expect sales of goods to be made. It is in that context that I find the word "warehouse," and in my opinion the word in that context contemplates a building of similar description to "private house" or "inn" in the sense that it is a building in which you would not expect sales to be made; therefore so far, without more assistance, I arrive at the conclusion that "warehouse" means warehouse as a place for storage as distinct from warehouse as a place for sale. But the matter does not stop there, because I find "warehouse" contrasted with "shop." A man may not sell in a warehouse, but may sell in his own shop. It seems to me that the word "shop" as contrasted with the word "warehouse" here means a place, whatever be its size, and whatever be the nature of the sales made there, and so on, which is not a warehouse as being a place for storage as distinct from a place for sale. Some assistance is to be derived from the verbs which are used in the section, namely, "sell, utter, or put to shew or sale." You are not to do these things in certain buildings, you may do them in shops. It seems to me that in that context a shop is contrasted with a warehouse—that the shop is a place in which you sell, as distinguished from a place in which you store.

Then it is suggested that there are some minor considerations which are to be borne in mind, as, for instance, that this shop, as a place for sale, is a place in which the defendant Ford sells wholesale and not retail. To my mind, having regard to the considerations to which I have already called attention, that makes no difference. I have no doubt it extends to retail, because the market was no doubt retail originally; it is now wholesale—I believe practically exclusively wholesale—but it might be retail to-morrow. That being so, for the purposes of

C. A. 1911 HAYNES v. FORD. Buckley L.J.

the construction of this section, I must have regard to the same considerations as if the market were a retail one, and I can find no distinction between sales wholesale and sales retail in a building which in fact I find to be a shop.

Then it is said that Mr. Ford not only sells his own goods, but sells goods of others. I should have thought that was common experience in a number of shops. There are many shopkeepers who do not own the goods which they sell; they receive them and sell them if they can; the goods come on sale or return; they hold the stock and sell it if they can and return it if they cannot. There are many cases in which the trader, the shopkeeper, sells upon commission. I might put the ordinary case of a publisher and bookseller who frequently does not own the books he sells; he sells them for the author, the owner, for a commission to be paid by the author; nevertheless, his premises are a shop. I can draw no distinction from the fact that he sells goods of others as well as goods belonging to himself.

It remains to see exactly what is the character of the trade that is carried on upon these premises. I asked Mr. Astbury in the course of the argument whether the appellant quarrelled with the finding of the learned judge as to what was in this respect the true effect of the evidence, and he said he did not. What the learned judge says is this (1): "There are residential rooms at the top of the building, but the three floors below are used for the purposes of storing goods for sale with this exception, that some of the goods, bananas, are stored, not merely for sale, but in order that they may ripen. Subject to that, the premises may be said to be a warehouse where goods are kept for sale and sold." To my mind it is plain that, as regards bananas, which are kept until they ripen with a view to selling, that makes no difference at all; numbers of traders in shops keep their own goods until they so mature as to become saleable. A butcher does so every day; and more particularly a country butcher; he hangs his meat until it is saleable. A cheesemonger keeps his cheese until it ripens. It would be wearisome to repeat instances. The goods here in these premises are all kept for sale, and none

(1) [1911] 1 Ch. 382.

the less because they are, for such time as is necessary, stored before they are sold. To my mind, discriminating between warehouse and shop (which is what I have to do), this is not a warehouse and is a shop—a place in which storage is made only for the purpose for which the premises exist, namely, for the purpose of selling.

Under those circumstances it seems to me that these premises are, within the meaning of this section, not a warehouse, but a shop; and, therefore, under these words of s. 10, which practically are words of grant, Mr. Ford is, by virtue of the Act of Parliament, entitled to carry on the business which he does.

For these reasons I am of opinion that the decision of the learned judge below was right and that this appeal should be dismissed with costs.

Kennedy L.J. I am of the same opinion. The burden of proof in this case rests upon the present appellant. He is not only plaintiff in the action, but, as has been pointed out, the action, although it is not one seeking for penalties, is one which is really in the nature of an action for penalties, because we could not, as it seems to me, find for the present appellant without holding at the same time that what the respondent has done has been an act of such a nature as under this statute which we are considering would render him liable to penalties. The case is not one in which the burden of proof is altogether to be neglected.

To my mind the whole case turns upon not merely the construction of s. 10, but its proper application to the particular facts of this case. So much has been said already by the Master of the Rolls and Buckley L.J. upon the nature of the section that I need say very little. I do not quite go the full extent of Mr. Buckmaster's argument as to the predominating purpose being to strike at conduct injurious to the market on the part of merely casual itinerant sellers. To my mind, while they are aimed at, as appears by the use of such words as "country chapman," "lader," and "kidder," it is quite clear that the other words of the section are properly applicable to regular vendors, such as the poulterer, the victualler, the

C. A. 1911 HAYNES v. FORD. Kennedy L.J.

gardener, the fruiterer, and the fish-seller, apart from the general words which follow, "or any other person or persons"; and, more than that, I do not quite see the use or the correctness of insisting upon what I may call the purpose of the section, as aimed against casual or itinerant sellers. The exception upon which the respondent relies is an exception of a person selling in his own shop or shops. A person who has his own shop or shops is a resident seller, and not an itinerant seller; and, therefore, as this is the great exception, so it seems to me that at least as much of this section is devoted to persons who are, or may be, possessed of what I may call some sort of local permanence as to persons who are coming to the neighbourhood of the market on such and such days for the purpose of selling articles mentioned in the section.

The real question, it seems to me, in this case, is whether or not the building occupied by the respondent is a shop; and there is a secondary question, which cannot be perfectly separated but which is a subordinate question, whether, assuming that this might be a shop, if you had nothing to put in antithesis, it is a shop for the purposes of this section as distinguished from a warehouse. Of course if it is not a shop, cadit quæstio; you need not inquire whether it is a warehouse, because it is only if it is a shop that the respondent can succeed. But there does arise the question whether, although this building may in popular language, and in some points of view, be properly treated as a shop, yet, looking at all the circumstances, it ought not for the purposes of this case, and for the construction and application of this section, to be treated as a warehouse.

Then, is it a shop? I think that it is. Each case must depend upon its own circumstances and, generally, upon special statutes. But I think here the one thing which prompts one somewhat to pause before deciding is no doubt the fact that this is a building in which a wholesale trade alone is carried on. There is no authority, and no dictum that I know of, that confines "shop" to a place where goods are sold otherwise than wholesale. But according to the ordinary and popular usage, I think, if you tell a person to go to a shop, you do tell him to go to a place in which, if he wishes, he can buy as it is called

by retail. But when you are construing a statute with these penal sections, I see no force in saying that, if the seller chooses to sell only to those persons who wish to buy wholesale, who would have to go to the place to buy, and have the opportunity there of seeing and inspecting, either in bulk or in sample, what they want to buy, and of taking these articles away, it should not be a shop because he will only sell wholesale. That seems to me reasonable, because any other view would bring us to this: that all that the respondent would have to do to get rid of the argument against him would be to be willing to sell certain quantities of his goods in smaller lots than he does at present—in other words that a slight and almost formal change would get rid of the whole argument founded upon the quantity which he is willing to sell, and desires to find customers for, in this building. As far as regards the question of the intention of the section, it is clear that originally at the time when this Act was passed the market to be set up was a market for retail purposes. It has become, it is said, an entirely wholesale market; but, so far as the word "shop" in this section is concerned, there would have been really more competition with the market had it been a retail shop than if it had been a wholesale one. Times have changed; the market has become wholesale, and this gentleman's business happens to be also wholesale. But I see nothing in what one may call the possible injury to the market which has been suggested to us which ought to lead one more to lean to the view that, because the business here carried on is wholesale, it is not within the protection of the word "shop" in relation to this market. It has already been said by Buckley L.J. that, looking at the area of 1000 yards, there is certainly no question here of taking advantage of the particular concourse of people coming to the market, because the same question would arise in the case of a business carried on at something more than half a mile from the place where the market is held.

The other point which was mainly insisted upon as against the construction of the word for which the respondent contends is, that Mr. Ford sells goods on commission. As a matter of fact, it seems to me impossible to say that this, even from the popular point of view, can make this building less a shop. It is

C A. 1911 HAYNES v. FORD. Kennedy L J

within the knowledge of every one in this Court that there are many shops, in the ordinary sense of the word, in which goods are sold which are not the property of the shopkeeper, in the sense of being the absolute property of the shopkeeper, but are disposed of by him by arrangement with those who supply him, and either on the terms of being paid a commission or, at any rate, of receiving a portion only of the price obtained from the shopkeeper's customer.

Then, if it is a shop, or may be treated as a shop, ought it to be treated, on the one remaining circumstance to which I have to refer, as a warehouse rather than a shop? Of course it is possible, as Neville J. points out, that, although it may be a shop if you had merely to contrast between it and most other things, when you have to contrast it, in the construction and interpretation of this section, with the word "warehouse," it is a "warehouse" so as to come within the mischief to which the earlier portion of the clause refers, and not within the permissive portion, as the respondent contends.

This seems to me to be an inference of fact. There may be a warehouse, as *Howard's Case* (1) shews, which is not a repository only; indeed there may be statutes in which it is clear that the word "warehouse," as there used, is not merely a place in which goods are stored, but a place in which there is also a selling room. But here it seems to me that as you have got "warehouse" in the first part, and "shop" in the second, one would rather, I think, be justified in drawing the inference that in this statute "warehouse" is meant to signify repository or storing place as contrasted with a place in which goods are stored only for the purpose of sale there, as is the case in Mr. Ford's business. Looked at as a question of fact, if you have to choose between "warehouse" and "shop" under circumstances not in dispute in this case, I think the true inference is that this building is only, as far as it can be spoken of as a warehouse, a warehouse ancillary and accessory to the main business of the shop; and it seems to follow from that that if you are asked to define the building you would say it is a shop, because the main and principal business is to sell there, and the only storage that

(1) Foster, 77

takes place there is accessory, ancillary, and incidental to the selling, which is the essential characteristic of the business that is there carried on.

C. A. 1911 HAYNES v. FORD. Kennedy L.J

Under these circumstances I do not think that we ought to reverse the judgment which has been given below.

With regard to the authorities, which are mainly authorities under the Markets and Fairs Clauses Act, 1847, which exempts a dwelling-house or shop, the language used by the judges (and especially the passage to which the Master of the Rolls referred in the judgment of Cockburn C.J. in *Fearon* v. *Mitchell* (1)) seems to me to make more for the view which the learned judge below has taken, and which I think is right, than for the contention which has been put forward on behalf of the appellant. I think this appeal must be dismissed.

Solicitors : *Simpson, Palmer & Winder ; C. J. Parker.*

H. B. H.

FAUNTLEROY *v.* BEEBE.

C. A. 1911 *April* 28

[1873 F. 98.]

Administration—Order for Sale—Conversion.

An absolute order for sale within the jurisdiction of the Court in an administration action operates as a conversion from the date of the order.

Appeal from a decision of Warrington J.

Charles Fauntleroy by his will, dated September 30, 1872, directed that any mortgage debt which at the time of his death should remain on his freehold hereditaments at Bermondsey should with the consent of the mortgagees remain as a charge thereon until such time as the accumulated fund thereinafter provided for the payment thereof should be sufficient to satisfy and discharge the same, or otherwise that the trustees and executors of his will should be at liberty by sale or further charge of the said hereditaments or a competent part thereof to raise such sum of money as they might think necessary to provide for the payment of the said mortgage debt, and, subject to that provision, he directed

(1) L. R. 7 Q. B. 690.

C. A. 1911

FAUNTLEROY v. BEEBE.

that his debts, funeral and testamentary expenses, and the legacies bequeathed by his will should be paid, and that his personal estate, except such as was thereafter specifically bequeathed, should be the primary fund for the payment thereof. Then, after making a specific bequest, he devised and bequeathed to his trustees his Bermondsey estate and certain other properties expressly mentioned and the residue of his real and personal estate upon trust to sell certain property therein mentioned, not including the Bermondsey estate, and to get in and convert his personal estate not specifically bequeathed, and out of the proceeds to pay his debts (other than the mortgage debt on his Bermondsey estate) and funeral and testamentary expenses; and as to his Bermondsey estate he directed his trustees to stand possessed thereof (subject to the power of sale above mentioned) upon trust out of the rents and profits thereof to pay the interest on the mortgage on that estate, and after payment thereof to pay to each of his four children, Robert Thomas Fauntleroy, Charles Sydney Fauntleroy, Emily Beatrice the wife of Augustus Greatrex, and Mary Fauntleroy, an annuity of 200*l.* for ten years, and upon further trust to invest the surplus rents and profits after payment of the mortgage interest and the four annuities by way of accumulation to the intent that a fund might be raised for the payment of the mortgage debt on the Bermondsey estate, and, subject thereto, the trustees were to stand possessed of that estate upon trust for his four children in equal shares but so that the estate should not be divided between them until the expiration of the term of ten years; and, in the event of the rents and profits becoming insufficient for the payment of the annuities in full, he directed that the annuity to his daughter Mary should not abate, but that the other annuities should abate pro rata.

The testator died on October 2, 1872, leaving all four children him surviving. In 1876 his daughter Mary married David Bernard Davies, and in 1887 she died intestate in the lifetime of her husband without issue.

Shortly after the testator's death a suit was instituted for the administration of his real and personal estate, and on November 8, 1873, the usual administration decree was pronounced. It

contained a direction that in case the testator's personal estate should not be sufficient for the payment in full of his debts, funeral and testamentary expenses, and the legacies bequeathed by the will the real estate should be sold with the approbation of the judge.

After the expiration of the ten years a petition was presented in the administration suit by Charles Sydney Fauntleroy and Emily Beatrice Greatrex and her husband for the sale of the Bermondsey estate. This petition was served on Mary Davies and her husband, but they did not appear. It appeared from the petition that a sum of 5000*l.* was due to the testator's children, other than Mary Davies, in respect of arrears of their annuities, that all the debts of the testator, other than the incumbrances on the Bermondsey estate, had been paid, but that the personal estate was insufficient for the payment of the debts, and that a sum of 2813*l.* odd had been paid out of the rents and profits of the Bermondsey estate towards payment thereof, and the petitioners were desirous that that sum should be raised by the sale of the Bermondsey estate, which was the only real estate of the testator remaining unsold. By an order made on the petition by Chitty J. on February 12, 1883, it was ordered that the Bermondsey estate should be sold with the approbation of the judge free from incumbrances of such of the incumbrancers as should consent to a sale and subject to the incumbrances of such of the incumbrancers as should not consent, and that the proceeds of the sale should be paid into Court to the credit of the cause. Part of the estate was sold under an order of June 16, 1885, made in pursuance of the order of February 12, 1883, confirming a conditional contract, but the rest of the estate still remained unsold. At the date of the death of Mary Davies in 1887 there still remained unpaid a number of incumbrances including the 5000*l.* due to the children in respect of their annuities, but this sum had since been paid. In March, 1894, David Bernard Davies was adjudicated bankrupt, and by an indenture dated July 24, 1896, the official receiver, as trustee in the bankruptcy, in consideration of the sum of 10*l.*, conveyed and assigned to Charles Sydney Fauntleroy and Emily Beatrice Greatrex all the estate and interest of the

C. A. 1911

FAUNTLEROY v. BEEBE.

bankrupt through his wife Mary Davies in the outstanding real and personal estate of the testator to hold the same to the use of the purchasers as tenants in common, as to such part as was of freehold tenure in fee simple, and as to such part as was personal estate absolutely.

Robert Thomas Fauntleroy, who was the heir-at-law of Mary Davies, was adjudicated bankrupt on October 20, 1886, and by an indenture dated November 9, 1903, the official receiver, as trustee in the bankruptcy, in consideration of the sum of 1000*l.*, conveyed to Thomas Frederic Simmons, his heirs and assigns, all his estate and interest in the one fourth share of Mary Davies in the premises known as 3, 5, and 7, Tanner Street, being part of the Bermondsey estate. This one fourth share was claimed on the one hand by Charles Sydney Fauntleroy and Mrs. Greatrex and on the other by Simmons. In answer to an inquiry directed by the Court, as to who were the persons now entitled thereto, the Master found in favour of Simmons. Charles Sydney Fauntleroy and Mrs. Greatrex then took out a summons to vary the certificate by declaring that they were the persons entitled.

Warrington J. said that the question turned upon the legal effect of the order of February 12, 1883. He held, first, following *Hyett* v. *Mekin* (1), which was approved by Farwell L.J. in *Burgess* v. *Booth* (2), that an order for the sale of an estate rightfully made operated as an immediate conversion from the date of the order; secondly, that Chitty J. had jurisdiction to order the sale of the whole estate and was not bound to order a sale of so much of the estate as it was necessary to sell to raise the charges upon it. It followed that on the death of Mary Davies her share in the Bermondsey estate was personalty and passed to her legal personal representative. The matter must be sent back to chambers to be dealt with on that footing.

Simmons appealed.

H. Terrell, K.C., and *W. H. Gover*, for the appellant. 1. The Court has no jurisdiction merely by making an order for sale to alter the nature of the property the subject-matter of the order.

(1) (1884) 25 Ch. D. 735. (2) [1908] 2 Ch. 648.

There is no conversion until the sale takes effect. The rule as to conversion depends upon the question what is the state of the property at the time when the parties come to the Court to assert their rights, and the basis of the rule is that each party must take the property in the state in which he finds it: *Dyer* v. *Dyer* (1); *Oxenden* v. *Lord Compton* (2); *Steed* v. *Preece*. (3) *Hyett* v. *Mekin* (4) is opposed to the appellant's contention. Kay J. in professing to follow *Steed* v. *Preece* (3) went far beyond it, and his decision is wrong and ought to be overruled. In *Arnold* v. *Dixon* (5), on which Kay J. relied, Hall V.-C., apparently against his own opinion, merely purported to follow *Steed* v. *Preece*. (3) In *Wallace* v. *Greenwood* (6) there was a conditional contract for sale which only required the sanction of the Court to make it good, and it is distinguishable on that ground. That also is the probable explanation of the decision of the Irish Court in *In re Stinson's Estate*. (7) *In re Dodson* (8) proceeded upon *Arnold* v. *Dixon* (5) and the dicta of Jessel M.R. in *Wallace* v. *Greenwood*. (6) In *Burgess* v. *Booth* (9) there had been an actual sale. The Court is in the position of a trustee and it has no power to alter the rights of the parties: *Ex parte Phillips* (10); *In re Nickels*. (11) In the absence of an express trust for sale or a binding contract there is no conversion until conversion in fact. To hold that an order for sale, without more, operates as a conversion is to alter the rights of the parties unnecessarily.

2. The Court had only jurisdiction to make an order for sale of so much of the property as was necessary for raising the money required for the payment of the debts. [They also referred to *Foster* v. *Foster*. (12)]

Cave, K.C., and *H. E. Wright*, for the respondents.

[COZENS-HARDY M.R. There is no doubt as to the jurisdiction of the Court to make the order.]

(1) (1865) 34 Beav. 504, 506.
(2) (1793) 2 Ves. Jun. 69.
(3) (1874) L. R. 18 Eq. 192, 196.
(4) 25 Ch. D. 735.
(5) (1874) L. R. 19 Eq. 113.
(6) (1880) 16 Ch. D. 362.
(7) [1910] 1 I. R. 13.
(8) [1908] 2 Ch. 638.
(9) [1908] 2 Ch. 648.
(10) (1812) 19 Ves. 118.
(11) [1898] 1 Ch. 630, 635.
(12) (1875) 1 Ch. D. 588.

C. A. 1911 FAUNTLEROY v. BEEBE.

Then the only question is whether the order effects a conversion. An order for sale operates exactly as a trust for sale. It imposes upon the trustees an imperative duty to sell and turns the right of the beneficiary into a right to a share of the proceeds of sale. There are three English decisions (*Arnold* v. *Dixon* (1), *Hyett* v. *Mekin* (2), and *In re Dodson* (3)) and one Irish one (*In re Stinson's Estate* (4)) precisely in point, and those decisions have never been doubted.

[They were stopped.]

COZENS-HARDY M.R. This appeal raises a question which was presented to us not only as one of difficulty and importance, but as one which was entirely open to review by us, and which ought to be decided in favour of the appellant unless we were prepared to go contrary to the decisions of the Court going back at least to the days of Lord Loughborough. The point may be stated very shortly. An order was made by the Court within its jurisdiction ordering an absolute sale of a particular property in which A., B., and C. are interested in equal shares. Before the sale takes place A. dies intestate. Is the one third share of A. real estate or personal estate? That I think is the problem when all the fringe is got rid of. In my opinion it is personal estate. I think that is the result which follows from a principle which is quite settled law, that if a testator devises real estate to trustees upon an absolute trust for sale, not a discretionary trust but an absolute trust, and to divide the proceeds between A., B., and C., it makes no matter that at the death of A. the property has not been sold. A.'s only right, in the view of the Court of Equity, is to his one third share of the money to be produced by that sale. It makes no difference that there may be an express power to the trustees to postpone the sale; the beneficial interest is not in any way affected by that. Of course, it makes no difference that A. may die immediately after the testator, or may die some years after the testator but before the sale takes place. In that case it could not be disputed that A.'s beneficial interest is simply and solely an interest in the money to be derived from

(1) L. R. 19 Eq. 113.
(2) 25 Ch. D. 735.
(3) [1908] 2 Ch. 638.
(4) [1910] 1 I. R. 13.

the sale; that the persons equitably interested on the death of A., B., and C. would not be their respective heirs-at-law but their respective personal representatives. What is the effect in point of principle if you have not a direct obligatory trust imposed by a testator upon his trustees to sell, but an order made by a Court of competent jurisdiction in the presence of A., B., and C. absolutely ordering the property to be sold? In my opinion logically, precisely the same result must follow. From that moment of time, in the view of the Court, the interests of A., B., and C. are interests in the proceeds to be derived from the sale absolutely ordered by the Court; so that if this matter had come before us for the first time to-day I should possibly have desired a little more time to think about it, but as at present advised I should have come to the conclusion that the decision of Warrington J. in this case was perfectly right; and that the share of one of the persons interested in this estate vested in his legal personal representative and not in his heir-at-law. But this is not a case, I think, that we need decide, or ought to decide perhaps, on strict grounds of principle, for it is of the last importance, in dealing with questions of title to land, to have regard to settled authorities and to long-standing decisions, and we ought to be very careful not to imperil titles by what we may say in this Court. In 1874 the question came before Hall V.-C., of whom it would be impossible for me to speak without respect,—in matters of this kind he was undoubtedly a great lawyer—and he in terms, as I read his decision, decided this very point. That was the case of *Arnold* v. *Dixon*. (1) There the Court, acting within its jurisdiction, directed a sale of the property, but before the sale was effected one of the parties interested in the real estate died. It was held that the estate was sufficiently converted, and then, when the estate was afterwards sold and the money had to be divided, it was held that the share of the deceased beneficiary passed to his legal personal representative. That was thirty-six years ago. The matter came again before Kay J. ten years afterwards in 1884. That was the case of *Hyett* v. *Mekin*. (2) In that case Kay J. gave a long carefully reasoned judgment, the

(1) L. R. 19 Eq. 113. (2) 25 Ch. D. 735.

C. A. 1911 FAUNTLEROY v. BEEBE. Cozens-Hardy M.R.

effect of which is stated with perfect accuracy in the head-note. "An absolute order for sale made within the jurisdiction of the Court in an administration suit operates as a conversion from the date of the order and before any sale has taken place." That was not a dictum, but was the very point of the decision. The learned judge went through all the prior authorities and came unhesitatingly to that conclusion. That was twenty-six years ago, and as recently as the year 1908 precisely the same point was decided by Eve J. in the case of *In re Dodson*. (1) Even if I had a doubt, which I have not, as to the accuracy of these decisions, I should hesitate long before I felt justified in overruling them in view of the undoubted fact that many people must have acted upon them for a great many years. In my opinion the decision of Warrington J. was perfectly right in holding that this share belongs to the legal personal representative and not to the heir. The appeal must therefore be dismissed with costs.

BUCKLEY L.J. *Arnold* v. *Dixon* (2) was decided by Hall V.-C. in 1874. *Hyett* v. *Mekin* (3) was decided by Kay J. in 1884, and in the interval *Wallace* v. *Greenwood* (4) had been decided by Sir George Jessel. The last-mentioned case, I agree, is distinguishable in that there was there a conditional contract which was approved by the order, and I therefore set that case aside for the moment, although there are some expressions in the judgment of Sir George Jessel in that case which go to the point which is here the subject of discussion and seem to shew that the learned judge was dealing with the case not on the footing of there being a conditional contract but on general principles. But the other two cases decided the point which we have to decide. They do not bind us. If we thought it necessary we could review them. But they have existed a great number of years and I should hesitate long before disturbing them. However in my opinion they are right. The matter seems to me to stand thus. If there be a trust for sale, devolution of the interests of the beneficiaries under that trust takes place on the footing that the

(1) [1908] 2 Ch. 638.
(2) L. R. 19 Eq. 113.
(3) 25 Ch. D. 735.
(4) 16 Ch. D. 362.

trust has been executed, and for this reason, that the beneficiary can do nothing but enforce the trust. He could say "Sell and give me my share of the proceeds." He could not say "Give me the land." If there be a power of sale the case is different. Until the donee of the power elects to exercise the power the land is land, and devolves as land, and when he has determined to exercise the power but has not executed it, when, for example, he has determined to sell but has not found a buyer, the beneficiaries cannot compel him to go on and sell. There is nothing which the beneficiaries can enforce. But directly an order for sale has been made binding the parties, in exercise of the jurisdiction that resides in the Court, it is competent to any beneficiary to say "I am a person entitled to the benefit of that order; carry it into effect," and in proper circumstances the Court will carry it into effect. In other words, in the case of a trust for sale, and in the case of an order for sale, the right of the beneficiary is to have the thing sold, and he can only get the proceeds of the sale. Counsel for the appellant has pressed upon us many expressions in judgments of judges relevant to the cases before them to the effect that when it comes to a question of devolution the property must be taken as it is. Those are cases addressed to this state of circumstances: Suppose there had been real estate and it had been converted into money the argument that has been advanced is that it ought to be treated as real estate because it is the proceeds of real estate. The answer is No; and, in dilating upon this question of taking the property as it is, it was to that state of facts that the judge was addressing himself in the language which he used. He said "You must take it as it is. It has been turned into money and you must take it as such." The proposition then is: "If the property has been converted there is no equity as between volunteers to have it reconverted. You must take it as it stands." That is not the question here. The question here is this: If the property has not been converted in fact, but has been converted notionally by an order made for its conversion, is it to be enjoyed in its notional state? *Arnold* v. *Dixon* (1) and *Hyett* v. *Mekin* (2) have answered that question in the affirmative. That in my

(1) L. R. 19 Eq. 113. (2) 25 Ch. D. 735.

C. A. 1911 FAUNTLEROY v. BEEBE. Buckley L.J.

opinion is good law. In that state of facts no one of several beneficiaries can say "I am entitled to take this as land." He can only say "I am entitled to have this order carried into effect and take it as money." The result is that there is conversion. For these reasons I am of opinion, both on principle and on authority, that this land has been converted and that the legal personal representative is entitled to it, and that this appeal ought to be dismissed.

KENNEDY L.J. I agree for the reasons which have been given. I have nothing to add.

COZENS-HARDY M.R. I intended to mention the decision of the Irish Court of Appeal in *In re Stinson's Estate* (1), to which our attention was called, and I should have placed great reliance upon it, except that I think it probable that as the death of the person in question occurred on June 30, 1908, and the sale was completed in July, Mr. Terrell was right in suggesting that there must have been a contract for sale before the death took place. No such distinction, however, was referred to by the learned judges. They took substantially the view that this Court has taken of late years in questions of this kind. That case tends to support our decision in the present case; but it is not so directly in point as *Arnold* v. *Dixon* (2), *Hyett* v. *Mekin* (3), and *In re Dodson*. (4)

Solicitors: *Henry Gover & Son; Edm. Ward Oliver & Son.*

(1) [1910] 1 I. R. 13.
(2) L. R. 19 Eq. 113.
(3) 25 Ch. D. 735.
(4) [1908] 2 Ch. 638.

H. B. H.

In re EARL OF SHEFFIELD.
RYDE *v.* BRISTOW.

[1910 S. 947.]

C. A.
1911
NEVILLE J.
March 10.
C. A.
May 24.

Will — Construction — Legacy — "Indoor and outdoor servants" — Weekly Wages—"Amount of one year's wages."

A testator bequeathed to each of his "indoor and outdoor servants" who at his death should be and should for five years previously have been in his service "the amount of one year's wages" in addition to what might be then actually due to them for wages:—

Held by Neville J. and the Court of Appeal, that all the indoor and outdoor servants of the testator who at his decease fulfilled the conditions as to length of service were entitled to the benefit of the bequest irrespective of whether they were hired at yearly or weekly wages.

In re Ravensworth [1905] 2 Ch. 1, distinguished.

Adjourned Summons.

The Earl of Sheffield, who died in 1909, by his will made in 1907 bequeathed all his personal estate to trustees upon trust to pay his funeral and testamentary expenses and debts as therein mentioned, and bequeathed (amongst others) the following pecuniary legacies free of duty, namely, "To my gardener Charles Greenfield, my butler Shem Weston, and my cricket ground man William Moore, the sum of 150*l.* each, such legacies to be paid to each of them respectively in addition to the legacies which they may take under the clause hereinafter contained and whether or not they shall be in my service at my decease. To each of my servants (indoor and outdoor) who at my death shall be and shall for five years previously have been in my service and shall not then be under notice to quit my service given or received by such servant I bequeath the amount of one year's wages in addition to what may be then actually due to them for wages," and the testator bequeathed the residue of his personal estate to the defendant Attenborough.

At the testator's death there were in his service three indoor servants, namely, the butler (Weston), a cook, and a lady's maid, and two outdoor servants, namely, the head gardener (Greenfield) and the cricket ground man (Moore), each of whom had been

C. A. 1911 — SHEFFIELD (EARL), *In re.* RYDE *v.* BRISTOW.

hired at yearly wages, which were paid quarterly, subject to a month's notice to be given or received. There were also twelve other outdoor servants, under-gardeners, estate carpenters, estate labourers, a lodgekeeper, and an errand or odd job man, all of whom were hired at and were paid weekly wages. All these indoor and outdoor servants had been in the testator's service for more than five years—the average period of service being thirty-one years—and none of them were under notice to quit. There were no other outdoor servants in the employ of the testator.

The question having arisen whether, having regard to the decision in the case of *In re Ravensworth* (1), the twelve outdoor servants who were engaged at weekly wages were entitled to the benefit of the above bequest, the surviving executor took out a summons to determine the matter.

The defendants were the residuary legatee and another legatee.

The summons was heard before Neville J. on March 10, 1911.

Bovill, for the executor.

Draper, for W. Bristow, one of the twelve outdoor servants at weekly wages. It is submitted that *In re Ravensworth* (1) is distinguishable. This is not a case of distinction between indoor and outdoor servants as in *Booth* v. *Dean* (2) and *Ogle* v. *Morgan*. (3) In *Blackwell* v. *Pennant* (4) Turner V.-C. misunderstood *Booth* v. *Dean* (2), which he professed to follow. The principle of the decision in *Booth* v. *Dean* (2) was not that the servants were paid by the week, but that they were not indoor servants, and in *In re Ravensworth* (1) both Joyce J. and the Court of Appeal followed *Blackwell* v. *Pennant* (4) with reluctance. The present case differs from all previous authorities in this, that it is a gift to a class consisting of indoor and outdoor servants, and it is a gift, not of "a year's wages," but of "the amount" of a year's wages; that means a sum equal in amount to the aggregate of the wages of fifty-two weeks.

Gutch, for the residuary legatee. There is not enough in this

(1) [1905] 2 Ch. 1.
(2) (1833) 1 My. & K. 560.
(3) (1852) 1 D. M. & G. 359.
(4) (1852) 9 Hare, 551.

case to distinguish it from *In re Ravensworth* (1) and *Blackwell* v. *Pennant.* (2) In the latter case, under a bequest of a year's wages to "servants," a gardener was excluded, not because he was an outdoor servant, but because he was hired at weekly wages. A gift of "the amount" of a year's wages makes no difference: *Breslin* v. *Waldron.* (3)

NEVILLE J. No doubt the Court is bound to some extent by the authorities that have been cited, and in *In re Ravensworth* (1) it was decided that a bequest of one year's wages to all servants in the employment of a testator at his death was limited to those servants who were hired at yearly wages. Now here it seems to me I have a different bequest. In the first place I observe that the testator gives a special legacy to three named indoor and outdoor servants "in addition to" the legacies they are to take as members of a class after mentioned, and then he goes on "to each of my servants (indoor and outdoor) who at my death shall be and shall for five years previously have been in my service, and shall not then be under notice to quit my service given or received by such servant, I bequeath the amount of one year's wages in addition to what may be then actually due to them for wages." Now it is to be noted that, if the benefit of this bequest is to be limited to servants hired at yearly wages, the two previously named outdoor servants are the only outdoor servants who would take. I cannot think, however, having regard to the use of the words "to each of my servants indoor and outdoor," that the testator intended in the case of his outdoor servants to benefit only the two already named, but that he intended to include a class he has described. In all the cases cited the words "indoor and outdoor" do not occur, and in addition to that the gift is of "the amount" of a year's wages; and having regard to the language of the will and the evidence I think the testator intended to benefit *all* his indoor and outdoor servants who fulfilled the conditions as to length of service, including the recipients of weekly wages, and that the authorities do not prevent me from coming to that conclusion, and I so hold.

(1) [1905] 2 Ch. 1. (2) 9 Hare, 551.
(3) (1855) 4 Ir. Ch. Rep. 333.

H. L. F.

C. A. 1911

SHEFFIELD (EARL), *In re.* RYDE *v.* BRISTOW.

The residuary legatee appealed. The appeal was heard on May 24, 1911.

Gutch, for the appellant. The case is completely covered by *In re Ravensworth* (1), where the Court of Appeal considered that the law was absolutely settled by *Blackwell* v. *Pennant* (2), which followed the earlier case of *Booth* v. *Dean* (3), in which Sir John Leach laid down the rule that when a testator gives a year's wages to all his servants he must be taken to mean servants who are paid a yearly wage. The rule is founded in good sense, for if it is not adopted there would arise in every case the difficult question, what is a servant? The rule was expressly approved by Vaughan Williams L.J. in *In re Ravensworth.* (1) Neville J. relied on the difference between "one year's wages" and "the amount of one year's wages" and on the fact that there were no outdoor servants, except those named, employed at a yearly wage, but there is no real difference between "one year's wages" and "the amount of one year's wages," and it was so held in the Irish case of *Breslin* v. *Waldron.* (4) As to the other point the will makes one class of indoor and outdoor servants and there are plenty of persons to answer the description.

Draper, for the outdoor servants, and *Bovill*, for the trustees, were not called upon.

COZENS-HARDY M.R. This is an appeal from a decision of Neville J. raising a question whether, upon the true construction of a few words in the will of the late Earl of Sheffield, certain servants are, or are not, entitled to legacies. [His Lordship read the words of the will set out above, and proceeded.] The question raised before Neville J. and before us is this: Is that gift limited to those servants, indoor or outdoor, who were hired for the year or at yearly wages—though the service may be determinable by notice at any earlier date—or does it apply to all servants who had been in the testator's service for five years previously, whether the hiring was for a

(1) [1905] 2 Ch. 1.
(2) 9 Hare, 551.
(3) 1 My. & K. 560.
(4) 4 Ir. Ch. Rep. 333.

year or whether it is necessary to ascertain by addition the amount of wages which the servant received for the year? Apart from authority I should have thought that there was no possible doubt as to the answer to that question. The testator has pointed out a class consisting of indoor and outdoor servants who have been in his service for five years, and said that each member of the class is to receive the amount of one year's wages in addition to what may be then actually due to him. We are asked to say that that gift ought to be read as a gift to "each of my servants hired upon a yearly hiring." As a matter of construction, apart from authority, I can see no ground for making any such addition to the language used, and I share the view of Neville J., who said that he had no doubt about the testator's intention, and that the only question was whether he could give effect to that intention having regard to the authorities. To my mind also the only question is whether we are precluded by authority from giving effect to the testator's intention. It is said that the decision of Turner V.-C. in *Blackwell* v. *Pennant* (1), approved and followed, as it was, by this Court in *In re Ravensworth* (2), prevents us from giving the effect we should otherwise give to the will before us. The bequest in *Blackwell* v. *Pennant* (1) was simply this: "I give to each of the servants living with me at the time of my decease, and who shall then have lived in my service for three years, one year's wages"; and Turner V.-C., a judge of whom I could never speak otherwise than with the greatest respect, says: "Where a testator gives a year's wages, he must, I think, be understood to mean, that he gives to those whom he has hired at yearly wages." The Vice-Chancellor thought that he was following a decision of Sir John Leach in *Booth* v. *Dean* (3), but that decision when examined does not bear out that view. If, however, the will in the present case had not been distinguishable from the will before Turner V.-C., however much I might personally differ from him, I should have felt great difficulty by reason of the decision in *In re Ravensworth.* (2) The testator in that case gave certain moneys to his wife subject to the payment by her "to all servants who shall be in my

(1) 9 Hare, 551, 554. (2) [1905] 2 Ch. 1.
(3) 1 My. & K. 560.

C. A. 1911

SHEFFIELD (EARL), *In re.* RYDE *v.* BRISTOW.

Cozens-Hardy M.R.

employment at my death and shall have been in my employment for five years previously thereto of one year's wages and of all death duties thereon in addition to any wages which may be accruing or owing to any of them and unpaid by me at my death"; and the Court of Appeal, affirming Joyce J., followed the decision of Turner V.-C. in *Blackwell* v. *Pennant* (1) and held that servants hired at a weekly wage paid monthly or fortnightly were not included in the bequest. It is right to say that Joyce J. expressed his personal disapproval of the decision, and that Stirling L.J. was not entirely satisfied with it, though they both felt themselves bound by authority. If the language of the present will had been identical with the language of that will, I should, whatever my own view had been, have loyally followed the decision, but that is not the case here. Neville J. has held that there is quite enough in the language of the present will to enable him to hold that these servants are entitled to share in the bequest. The main distinction is that the gift in the present case is not of "one year's wages," but of the "amount of one year's wages." The testator is dealing with a class of indoor and outdoor servants, a class which we all know would naturally include persons not engaged on a yearly hiring. I, therefore, do not feel myself bound by either of the two cases to construe this will in any other way than that which I conceive to be its true meaning. In my opinion the decision of Neville J. that these servants are entitled to share in the bequest is quite right, and the appeal must be dismissed.

BUCKLEY L.J. In *Booth* v. *Dean* (2) the gift was as follows: "I give to each of my servants one year's wages over and above what may be due to them at the time of my decease." The question was whether a person who had worked in the testator's garden under his gardener for several years at weekly wages, and a boy who had served the testator as a cowboy for some time at weekly wages, were entitled to the year's wages. Sir John Leach, according to the first sentence of his reported judgment, "was of opinion that these persons were not servants in the sense in which the testator had used the expression." If the language of

(1) 9 Hare, 551, 554.

(2) 1 My. & K. 560.

the will in that case had been the same as we find in the present will, "To each of my servants (indoor and outdoor) . . . . the amount of one year's wages," Sir John Leach would not, I think, have said that those persons were not servants within the testator's meaning. He goes on, "In speaking of a year's wages, the testator plainly used that expression with reference to family servants usually hired by the year." By those words I think he was testing again the sort of servant to which that testator was referring and not saying that under the words "a year's wages" no servant could take who was not hired by the year. Of course a servant hired by the year requires a year's notice. He was thinking perhaps of a statutable hiring, but that was his decision on those words.

In *Blackwell* v. *Pennant* (1) Turner V.-C., dealing with *Booth* v. *Dean* (2), says: "The bequest there, as here, was of a year's wages; and Sir J. Leach treats it as clear, that the expression must be construed to refer to family servants usually hired by the year. In that opinion I fully concur." Then the Vice-Chancellor proceeds: "Where a testator gives a year's wages, he must, I think, be understood to mean that he gives to those whom he has hired at yearly wages." To hire at yearly wages, however, is not the same thing as to hire by the year. He goes on, "The nature of the gift explains the persons for whom it was intended. To impute to the testator that he intended, by a year's wages, the aggregate of the wages of fifty-two weeks, would, I think, be a most unreasonable and strained construction of the words which he has used." Accepting that as the decision of a very great judge, it seems to me not to apply here. For the words of this will indicate an aggregate sum. The gift is not of "a year's wages," but of the "amount of one year's wages." This is a sum to be arrived at by addition. The testator has himself pointed to an aggregate sum. The word "amount" implies to my mind subordinate sums which when added together make a larger sum. The next case is *In re Ravensworth* (3)—a decision by which we are bound. The gift there was to the testator's wife subject to the payment by her

(1) 9 Hare, 554. (2) 1 My. & K. 560.
(3) [1905] 2 Ch. 1.

C. A. 1911 — SHEFFIELD (EARL), *In re.* RYDE *v.* BRISTOW. — Buckley L.J.

to all servants of one year's wages. The Court there felt themselves bound by the authority of *Blackwell* v. *Pennant.* (1) If that authority bound the Court as regards that will, it does not I think bind us as regards the will before us. We have to ascertain what the testator meant. He was desirous of benefiting a class of persons—servants indoor and outdoor who had been in his service for five years previously to his death, persons to whom he owed gratitude for long and faithful service. They constitute the class. I feel myself free from the first sentence of Sir John Leach's judgment in *Booth* v. *Dean.* (2) Then he gives to each member of the class the amount of one year's wages. That form of words is applicable to a person who has been hired neither by the year nor at a yearly wage, but at wages by the week, the month, or the quarter. Suppose the servant to have been engaged at quarterly, or monthly, or weekly wages, I have first to ask whether he falls within the class—whether he has rendered a certain length of service—and then ascertain what is the amount of his wages for one year. I agree that this appeal should be dismissed.

KENNEDY L.J. I am of the same opinion. I feel no doubt about the intention of the testator. The only question is whether we can give effect to that intention having regard to certain authorities. If the words in the present will were exactly the same as those in *In re Ravensworth* (3), we should be bound to follow that decision whether we agreed with it or not; but the words here are different, and without laying any stress on the first ground of distinction taken by Neville J., I do think that the gift, being of "the amount of one year's wages," is sufficient to enable us to say truly that the meaning of the testator in this case is one to which we can give effect without overruling or departing from any previous decision.

Solicitors: *Palmer & Bull, for Lewis & Holman, Lewes; Kennedy, Ponsonby & Co.*

(1) 9 Hare, 551. (2) 1 My. & K. 560.
(3) [1905] 2 Ch. 1.

J. R. B.

WARRINGTON J.
1911
May 26.

In re GREEN.
GREEN *v.* MEINALL.

[1911 G. 766.]

Husband and Wife—Marriage with Deceased Wife's Sister—Death of Husband before 1907—*Death intestate of Son of First Marriage—Next of Kin—Interest in Expectancy—Spes Successionis—Deceased Wife's Sister's Marriage Act,* 1907 (7 *Edw.* 7, *c.* 47), *ss.* 1, 2.

Sect. 1 of the Deceased Wife's Sister's Marriage Act, 1907, applies to and makes valid a marriage with a deceased wife's sister although, owing to the death of one of the parties, the assumed relationship of husband and wife has ceased to exist before the date of the passing of the Act.

The spes successionis which the brother of a person has during his lifetime to a share of his property, as one of his next of kin, in the event of his dying intestate, is not an "interest in expectancy" protected by s. 2 of the Act.

Thomas Green died intestate on March 19, 1911. His father, James Green, twice went through the ceremony of marriage, on the second occasion with the sister of his deceased wife. He had children by both marriages, and Thomas Green was a son of the first marriage. James Green died in March, 1900, and the second wife died in October, 1907. Thomas Green was a bachelor, and he left some personal estate; and the question arose whether his brother and sister of the half blood, the children of the second marriage, were entitled to participate with the children of the first marriage as his next of kin in the division of his estate.

The administrator of Thomas Green took out this originating summons for the determination of the question.

J. H. Redman, for the summons.

H. H. King, for the children of the first marriage. At the date of the passing of the Deceased Wife's Sister's Marriage Act, 1907, James Green was dead, so that there was no relationship existing between the parties upon which s. 1 of the Act could operate. Acts of Parliament are not construed retrospectively unless it is absolutely necessary to do so. Although this Act renders valid as civil contracts previous marriages with deceased

WARRINGTON J. 1911 GREEN, *In re.* GREEN *v.* MEINALL.

wives' sisters, it does not alter or interfere with any rights of property depending on those marriages not being valid: *In re Whitfield.* (1) Further, we are protected by s. 2. At the date of the Act we had a hope of succeeding to the whole of our brother's property if he died intestate. That was an "interest in expectancy" which was preserved by s. 2: *In re Parsons.* (2) Sect. 22 of the Finance Act, 1894, says that "The expression 'interest in expectancy' includes an estate in remainder or reversion and every other future interest whether vested or contingent." That definition does not apply to the Act of 1907, but it shews that the Legislature may reasonably have intended to include a spes successionis. The word "expectancy" is not used in the Colonial Marriages Act, 1906.

R. M. Pattisson, for the children of the second marriage, was not called upon to argue.

WARRINGTON J. stated the facts and proceeded: On the death of Thomas Green intestate, the question arises as to whether the persons entitled to share under the statute in the distribution of the intestate's personal estate are the issue of the father's first marriage or the issue of both marriages. That depends on the construction and effect of the Deceased Wife's Sister's Marriage Act, 1907. It is plain that but for that Act the second marriage would have been void and the issue illegitimate, and, therefore, not entitled to share with the children of the first marriage in the distribution of the estate of one of the children of that marriage on his death intestate. The Act provides that "No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void or voidable, as a civil contract, by reason only of such affinity." The father of the intestate was dead at the date of the passing of the Act, and, therefore, the marriage between himself and his deceased wife's sister was not then a subsisting marriage at that date; and it is objected on behalf of those who desire to limit the class to the issue of the first marriage that the Act only applies to marriages subsisting at the date of the passing of the Act. To hold that

(1) [1911] 1 Ch. 310. (2) (1890) 45 Ch. D. 51.

would, in my opinion, be directly contrary to the language of the Act. The Act says (s. 1) "No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void." To put it in the affirmative, which I think I am entitled to do on account of some words contained in the 2nd section, "every marriage between a man and his deceased wife's sister shall be deemed to have been a good civil contract." There was here a marriage between a man and his deceased wife's sister, that marriage is not to be deemed to have been void, and, therefore, it was, what it purported to be, valid as a civil contract, and the children are legitimate in the eye of the law. In my judgment that objection is one to which no force can be given.

Then another objection is raised. The children of the first marriage say "we were the persons who at the date of the passing of the Act, if Thomas Green had then died intestate, would alone have been entitled to share in his personal estate, and there are provisions in the 2nd section of the Act which protect us from having intruded into that class of persons others who were not so entitled." Sect. 2 of the Act provides: "No right, title, estate or interest, whether in possession or expectancy, and whether vested or contingent at the time of the passing of this Act, existing in, to, or in respect of, any dignity, title of honour, or property, and no act or thing lawfully done or omitted before the passing of this Act shall be prejudicially affected nor shall any will be deemed to have been revoked by reason of any marriage heretofore contracted as aforesaid being made valid by this Act." That is why on the first point I am justified in turning the negative into the affirmative, because the 2nd section treats these marriages as having been made valid. The section goes on, "And no claim by the Crown for duties leviable on or with reference to death, and before the passing of this Act due and payable, and no payment, commutation, composition, discharge, or settlement of account in respect of any duties leviable on or with reference to death before the passing of this Act duly made or given, shall be prejudicially affected by anything herein contained. Nothing in this Act shall affect the devolution or distribution of the real or personal estate of any intestate, not

WARRINGTON J.
1911
GREEN, *In re.* GREEN v. MEINALL.

being a party to the marriage, who at the time of the passing of this Act shall be, and shall until his death continue to be, a lunatic, so found by inquisition."

Now it is contended that the spes successionis which the brother of a person has during his lifetime to a share in his property is a right, title, estate or interest in expectancy in, to, or in respect of property, and, therefore, protected by s. 2. If that argument were to prevail I should be going contrary to well-known principles of English common law. I need only refer to the elaborate investigation of this subject by Kay J. in *In re Parsons*. (1) He begins by saying that "It is indisputable law that no one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir-at-law or next of kin of such living person. During the life of such person no one can have more than a spes successionis, an expectation or hope of succeeding to his property." So far for the words "estate or interest." The Act has also the word "title." With regard to that there is another passage in the judgment (2): "can a possible next of kin of a person who is to be supposed to die at a future time be said to have a 'contingent title,' or is not the proper view that he has no title at all, nothing but an expectation or hope which is not recognised in law as any title? While the propositus is living every relative he has in the world is a possible next of kin. Can each one say that he has a contingent title? He may have sons, brothers, and nephews. Can the nephew, living the sons and brothers, say, 'I have a title'? If he cannot, then the brother cannot, nor the son. A spes successionis is not a title to property by English law. Why should this meaning be given to it in the statute in order to deprive a married woman of her right to separate property?" Then lower down the learned judge says with reference to the statutory next of kin (3): "They have no existence whatever in law while the propositus is living. No one can as possible next of kin even bring an action to perpetuate testimony as to his kinship during that period." Then I turn back to the Act. Is it possible

(1) 45 Ch. D. 51, 55. (2) 45 Ch. D. 56.
(3) 45 Ch. D. 63.

to say that this spes successionis is a "right, title, estate or interest in expectancy in, to, or in respect of property." In my opinion it is not. As Kay J. points out, it is nothing more than that somebody is entitled to personal property, and if the circumstances remain as they are at the moment his next of kin will succeed to a share. It is nothing more than that. In my opinion the 2nd section does not preserve that right. Accordingly the personal estate of Thomas Green must be divided between all the next of kin whether of the whole or half blood.

Solicitors: *Child & Child; Hores, Pattisson & Bathurst.*

H. C. R.

In re TEWKESBURY GAS COMPANY. TYSOE *v.* THE COMPANY.

[1910 T. 1031.]

Company—Debenture—Construction—Principal repayable "on or after" a specified Date—Power of Company to repay by Drawings—Due Date of Principal—Inadmissibility of Prospectus to explain Meaning of Debenture—Provision void for Repugnancy.

A company issued a series of debentures each of which contained a covenant by the company that it would "on or after" January 1, 1898, pay to the registered holder of the debenture the principal sum thereby secured. The debenture then stated as follows: "The debentures to be paid off will be determined by ballot, and six calendar months' notice will be given by the company of the debentures drawn for payment."

The company never paid off any of the debentures or held any ballot, but after January 1, 1898, one of the debenture-holders gave the company six calendar months' notice to pay off her debenture, and, at the expiration of the notice, commenced an action to enforce her security:—

Held, that on the construction of the covenant and in the events that had happened the principal money secured by the plaintiff's debenture was presently due and payable, and that, if the provision as to balloting and notice meant that the company was never to be bound to pay off any debenture unless it elected to do so and balloted and gave notice accordingly, the provision was void for repugnancy on the principle stated in Sheppard's Touchstone, p. 273, and illustrated in *Watling* v. *Lewis* [1911] 1 Ch. 414.

Quære, whether on that principle the principal money was not, any time after January 1, 1898, due on demand.

In determining a question as to the construction of a debenture the

PARKER J.

1911.

TEWKESBURY GAS COMPANY, *In re.* TYSOE *v.* THE COMPANY.

Court cannot refer to the prospectus pursuant to which the debenture was issued.

In re Chicago and North West Granaries Co. [1898] 1 Ch. 263, followed.

THE Tewkesbury Gas Company, Limited, was incorporated in the year 1870 under the Companies Acts, 1862 and 1867, as a company limited by shares, and on November 3, 1892, the company issued a prospectus containing the statement that the directors of the company offered for subscription "2000*l.* debentures, in sums of 25*l.*, 50*l.*, or 100*l.*, carrying interest at 4 per cent. per annum, redeemable at par, at the option of the company, on or after 1st January, 1898, on the company giving six months' notice of their intention. The debentures to be repaid will be determined by ballot." The form of application for debentures sent with the prospectus contained the following words: "I hereby request you to allot to me the same, and I hereby agree to accept the same or any part thereof which shall be allotted to me upon the terms of the prospectus dated the 3rd day of November, 1892."

In December, 1892, the company borrowed the 2000*l.*, to secure which it issued a series of registered debentures, all of which were in the same form.

One of the debentures was issued to William Allard, and the body of it commenced with the statement that "The Tewkesbury Gas Company, Limited (hereinafter called the company), in consideration of the sum of 100*l.* paid to the company by Mr. William Allard, of Tewkesbury, will on or after the 1st day of January, 1898, at the registered office of the company, or at the bankers of the company, pay to him, the said Mr. William Allard, or other the registered holder for the time being hereof, his executors or administrators, the sum of 100*l.* The debentures to be paid off will be determined by ballot, and six calendar months' notice will be given by the company of the debentures drawn for payment. In the meantime the company will pay to him or them interest thereon at the rate of 4*l.* per cent. per annum by half-yearly payments on the 30th day of June and the 31st day of December in every year." There was also a statement that the debenture was issued upon and subject to the conditions thereinafter set out.

By condition 1 it was provided that all the debentures were to rank pari passu.

Condition 10 provided that, subject as thereinafter mentioned, the debenture was and should be a charge on all the plant, machinery, stock, book and other debts, goodwill and assets, and generally on all the present and future property real and personal of the company, and that such charge was to be a floating security, but so that the company was not to be at liberty to create any mortgage or charge in priority to the said debentures.

Condition 11 provided that nothing in the debenture should create any charge on or prevent the company from selling, assigning, or otherwise disposing of any business, rights or privileges, which were then or thereafter might be vested in or carried on or held by the company.

Allard's debenture was transferred to Mrs. Ellen Tysoe, who became the registered holder thereof.

The company duly paid the interest on the debentures, but did not pay any principal money secured thereby or hold any ballot with a view to determining which debentures should be paid off.

By a notice dated November 18, 1909, and served on the company on November 23, 1909, Mrs. Tysoe gave notice to the company to pay to her within six calendar months after service the principal sum of 100*l.* secured by her debenture, and that if default should be made in payment she would take such proceedings as might be necessary to obtain payment of the money.

The money not having been paid, Mrs. Tysoe on July 21, 1910, commenced the present action, suing "on behalf of herself and all other debenture holders (if any) of the defendant company having similar rights" against the company, claiming as follows: "(1.) A declaration that the mortgage debentures issued by the defendant company constitute a first charge upon all the property and assets of the company comprised therein. (2.) Payment of the said sum of 100*l.* and interest thereon at the rate of 4 per cent. per annum. (3.) All necessary accounts and inquiries. (4.) If necessary foreclosure or sale. (5.) If necessary a receiver and manager. (6.) Costs."

PARKER J.
1911
TEWKESBURY GAS COMPANY, *In re.* TYSOE *v.* THE COMPANY.

The company by its defence denied that the 100*l.* became due on May 23, 1910, or at any other time, and set up the contention that on the true construction of the debentures the company had been and still was at liberty at its sole discretion on or at any time after January 1, 1898, to redeem the debentures or such of them as the company should determine, and that the holding of any ballot with a view to determining which of the debentures should be paid off was wholly dependent upon the exercise by the company of that discretion, and that no part of the principal moneys was payable unless and until the company exercised the discretion. In the circumstances the company contended that no principal money was due to the plaintiff or any other person and that the plaintiff's notice was inoperative.

The action was tried before Parker J. on June 13, 1911.

A. Grant, K.C., and *Owen Thompson*, for the plaintiff. The question is one as to the construction of the debenture itself, which contains the whole contract between the holder and the company; the prospectus or form of application cannot be looked at for the purpose of interpreting that contract: *In re Chicago and North West Granaries Co.* (1) Where there is a pari passu series of debentures in a form which fixes no date for repayment of the principal, the holder of any debenture, after six months' notice to the company to pay off the principal, is entitled to recover his money, although some of the other debenture-holders refuse to be paid off: *Hopkins* v. *Worcester and Birmingham Canal Proprietors.* (2)

In the present case the principal secured by the plaintiff's debenture, if not payable on demand any time after January 1, 1898, is payable after six months' notice demanding payment: see Sheppard's Touchstone, p. 369. If the proviso as to balloting and notice means that the company need never pay off any debentures unless it chooses to do so, the proviso is void, as being repugnant to the covenant to pay: *Watling* v. *Lewis.* (3)

Romer, K.C., and *Luxmoore*, for the defendant company. The prospectus and form of application sent with it shew exactly

(1) [1898] 1 Ch. 263. (2) (1868) L. R. 6 Eq. 437.
(3) [1911] 1 Ch. 414.

what the contract was—that is to say, neither a debenture-holder nor the company can require payment to be made before January 1, 1898, but after that the company can pay off as and when it likes, subject to the proviso that it must ballot for the debentures which are to be paid off and give notice. In other words, the debenture is what is known as a "perpetual debenture," subject to the right of the company to select by ballot the debentures to be from time to time redeemed. There is no obligation on the company to hold any such ballot; it has an option to do so, but until that option is exercised the creditor cannot insist on payment being made. Perpetual or irredeemable debentures, subject or not subject to some provision for payment off before winding-up, have been in common use for many years, and their effect was considered by Buckley J. in *In re Southern Brazilian Rio Grande do Sul Ry. Co.* (1) Since then their validity has been affirmed by statute: Companies Act, 1907 (7 Edw. 7, c. 50), s. 14; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 103.

Except under the provision as to drawings and notice the company cannot pay off any debenture-holder, for the debentures are all to rank pari passu, and to pay off one debenture-holder before the others would be to give him a priority which is expressly forbidden by the debentures.

A. Grant, K.C., in reply.

Cur. adv. vult.

June 21. PARKER J. The question I have to determine is really a question as to the true construction of the debenture sued on. In determining this question I cannot, in my opinion, properly refer to the prospectus pursuant to which the debenture was issued: *In re Chicago and North West Granaries Co.* (2) Nor again can I see how such prospectus or the application of the plaintiff's predecessor in title for debentures on the terms thereof can be treated as raising any personal equity by which the plaintiff is bound. The only relevant equity would be an equity to have the debenture rectified so as to conform with the terms of the prospectus; and there is no claim for rectification

(1) [1905] 2 Ch. 78. (2) [1898] 1 Ch. 263.

PARKER J. 1911 TEWKESBURY GAS COMPANY, *In re.* TYSOE *v.* THE COMPANY.

and even if there were, purchase for value without notice would be a good defence. The company has sealed a debenture which, on the face of it, is intended to be transferable and to contain all the terms regulating the relative rights of the company and the transferee.

The debenture commences with a covenant by the company that the company will on or after January 1, 1898, pay to William Allard or the registered holder of the debenture (in the events which have happened, the plaintiff) the sum of 100*l.*

What is the effect of a covenant to pay on or after a specified date? A covenant to pay, without specifying a time for payment, creates either a present liability to pay or, at the least, a liability to pay on demand. A covenant to pay on or before a certain day creates a liability to pay on the day named with an option of earlier payment. In the case of a covenant to pay on or after a certain day, it seems to me that there is similarly an option to pay on the day named, but no liability till after the day is passed, and possibly not even then, till demand be made. It is true that any subsequent day for ever would be after the day named, but it would appear that an obligation to pay solvendum nunquam or solvendum at Doomsday is an obligation to pay in præsenti, or at any rate on demand, the solvendum only being rejected: see Sheppard's Touchstone, p. 369.

I am of opinion, therefore, that, on the true construction of the covenant and in the events which have happened, the 100*l.* covenanted to be paid is presently due and payable.

But it is said that, even if this be the prima facie meaning of the covenant, this meaning ought to be rejected because of the clause which follows. This clause provides that the debentures to be paid off will be determined by ballot, and six months' notice will be given by the company of the debentures drawn for payment. In my opinion, it might well be argued that this clause inferentially confers on the company a power to pay off any debentures before their due date, provided that in this case the debentures to be paid off are balloted for and notice given, but this is not the way in which the company ask me to construe the clause. Their contention is that it means that the company is never to be bound to pay any of the debentures referred to

unless they elect to do so, in which case they will ballot for the debentures to be paid and give notice. In other words, they ask me to construe a covenant which purports to impose a liability for payment as exempting the company from all liability to pay unless they choose to hold a ballot and give notice. This would, in my opinion, be a somewhat extraordinary construction, and I cannot see my way to adopt it.

Another mode of stating the defendants' contention is that, although there may be in the first sentence of the debenture a covenant to pay in respect of which a liability would arise after January 1, 1898, yet this liability must be taken as limited by the second sentence, which shews that it is only to be enforced if the company choose, after January 1, 1898, to hold a ballot and the debenture is drawn for payment. But if there be a covenant to pay, with a proviso that the covenant shall only be enforced at the option of the covenantor, the proviso would, in my opinion, be void for repugnancy on the principle stated in Sheppard's Touchstone, at p. 273, and illustrated by the recent case of *Watling* v. *Lewis*. (1) Having come to the conclusion that under the covenant, properly construed, the money secured is now presently payable, I cannot construe the subsequent sentence of the debenture as defeating this liability.

In my opinion, therefore, the action succeeds, and I propose to give judgment, with costs, for the principal and interest due on the debenture, and to reserve liberty to the plaintiff to apply to enforce her security if the amount be not paid within, say, two months.

Solicitors for plaintiff: *Surr, Gribble, Nelson & Oliver, for Brookes & Badham, Tewkesbury.*

Solicitors for the company: *Thwaites & Thompson, for Sidney Baker, Tewkesbury.*

(1) [1911] 1 Ch. 414.

F. E.

C. A.
1911
PARKER J.
Feb. 4.
C. A.
May 9, 10, 31.

In re PRYCE.
LAWFORD *v.* PRYCE.

[1904 P. 2827.]

Conflict of Laws—Power of Appointment—Exercise—General Power under English Settlement—Donee a Domiciled Dutchwoman—Gift by Will in Dutch Form—Admission to Probate in England—Limited Power of Disposition—Dutch Law—English Law—Effect of Exercise of Power.

Under the will of her father an English lady had a general power of appointment by will over certain funds in England. She married a Dutch gentleman and acquired a domicil in Holland. By Dutch law her power of disposition was limited to seven eighths of her property, her mother, in the events which happened, being entitled to one eighth as "legitimate portion." By her will, which was in Dutch form but admitted to probate in England, she appointed her husband as "sole heir of the whole of which the law in force at the time of her death should allow her to dispose in his favour," and also appointed him executor, with all requisite powers, including the right to take possession of all her real and personal properties according to law. According to Dutch law the exercise of the power had the effect of making the appointed property her assets for all purposes:—

Held, that by English law also the lady had by exercising the power made the appointed property her assets for all purposes; that her power of disposition over it was no greater than over property to which she was absolutely entitled; and consequently that her husband was only beneficially entitled to seven eighths of the appointed property.

Pouey v. *Hordern* [1900] 1 Ch. 492, *In re Mégret* [1901] 1 Ch. 547, and *In re Bald* (1897) 76 L. T. 462, distinguished.

In re Hadley [1909] 1 Ch. 20, followed.

Thomas Pryce, by his will made in 1893, appointed his wife and two other persons trustees and executors thereof, and, subject to certain gifts to his wife, he bequeathed certain personal estate to his trustees upon trust, at their discretion, either to retain or to call in and convert into money the same, and to stand possessed of the same upon the trusts thereinafter declared. He devised all his real estate to his trustees upon trust at their discretion for sale, and to invest the proceeds and to pay his wife an annuity, and, subject thereto, to hold his trust estate in trust for his children in equal shares absolutely. The testator further declared that the share of each of his

daughters should be held upon certain trusts in favour of the daughter and her children if any, but that if no child of a daughter should live to attain a vested interest, then the daughter's share should be held in trust for such persons as she should by will appoint, and, in default of appointment, for the persons who would have been entitled if she had died intestate and a spinster. By a codicil one Lawford was appointed a trustee and executor in the place of one of the original trustees and executors. The testator died and his will and codicil were proved in the year 1904. He left a widow and four children. One child, Jane Esther Pryce, in January, 1908, married G. H. O. Geertsema, a Dutch subject domiciled in the Netherlands. There was no issue of the marriage, and she died in October, 1909, having by her will, dated in September, 1909 (in Dutch form and in the Dutch language), appointed her husband as her "sole heir of the whole of which the law in force at the time of her death should allow her to dispose in his favour," and she thereby declared that she appointed her husband as executor of her disposition or last will, and gave him all requisite power, mandate, and authority, including therein the right to take possession of all her real or personal properties according to law. Letters of administration, with Mrs. Geertsema's will annexed, were in February, 1910, granted by the High Court of Justice in England (Probate Division) to a gentleman representing G. H. O. Geertsema.

An originating summons was taken out by Lawford, one of the executors of the testator, for the determination of the question whether Mrs. Geertsema's will operated as an effectual exercise of the power of appointment given to her by her father's will.

An affidavit of Dr. Henny as to the Dutch law was filed in support of the summons, and stated his answers to questions on which he had been asked to advise Mrs. Pryce.

The questions and answers were to the following effect:—

Q. 1. Can the property over which a general power of appointment is exercised be deemed by the law of Holland movables of the donee of the power, Mrs. Geertsema?

Answer. The property over which a general testamentary power of appointment is exercised is by the law of Holland

C. A. 1911 PRYCE, *In re.* LAWFORD *v.* PRYCE.

deemed to be movables or immovables of the appointor according as the property is in fact movable or immovable; but in either case becomes by the fact of the exercise of the power part of the estate of the appointor.

Q. 2. Has the exercise by Mrs. Geertsema of the general power of appointment given by her father's will had the effect, in the events which have happened, of making the appointed property assets of the former?

Answer. The exercise of the power has, in the events which have happened, unquestionably had the effect of making the appointed property assets of Mrs. Geertsema for all purposes.

Q. 3. Generally, what is the right of Mrs. Pryce, the testator's widow, to participate in the estate of Mrs. Geertsema?

Answer. The law of Holland allots to the surviving parents of a deceased person who died childless a certain portion of that person's succession of which the latter cannot dispose by will, and in the word "succession" I include movables over which a general power of appointment has been exercised. In the present case, the testatrix having left no child or children but a surviving mother only and three surviving brothers or sisters, the mother is entitled absolutely for her own use and benefit to one eighth part of the succession which she can claim under the law. This doctrine of the legitimate portion explains the expression occurring in all notarial wills in Holland "of which the law in force at the time of" testator's "death shall allow" him "to dispose."

The summons was heard before Parker J. on February 4, 1911.

Austen-Cartmell, for the applicant, stated the facts.

Romer, K.C., and *R. Bisschop*, for G. H. O. Geertsema. By s. 27 of the Wills Act, 1837, a general devise of the real estate of a testator, or a bequest of his personal estate, is to be construed to include any real estate, or personal estate, as the case may be, "which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the

will." That section is a rule of construction which does not apply to a foreign will which is not executed according to the Wills Act, though it is valid according to the law of the testator's domicil and has been admitted to probate in this country, unless the will uses words introducing the statutory rule of construction: *In re D'Este's Settlement Trusts* (1); *In re Price.* (2)

The question whether the power has been exercised must be determined upon evidence admissible by the law of England: *In re Scholefield.* (3)

The will of Mrs. Geertsema passed everything to her husband to the exclusion of her mother: *Pouey* v. *Hordern* (4); *In re Mégret.* (5) [They also referred to *In re Baker's Settlement Trusts* (6); *In re Bald.* (7)]

Martelli, K.C., and *Owen Thompson*, for Mrs. Pryce. The effect of Mrs. Geertsema's will is to make her husband her executor, with power to get in all her estate; but he only takes beneficially the seven eighths which the law of Holland allows him to take, and holds the other one eighth in trust for Mrs. Pryce. In *Pouey* v. *Hordern* (4) the will was in English form and purported to exercise the power of appointment. The will must be construed and have effect given to it according to the law of Holland.

J. F. H. Bethell, for the persons entitled to the remaining three fourths of the testator's estate.

Romer, K.C., in reply. The affidavit of Dr. Henny is not clearly stated. The Dutch law is not applicable.

PARKER J. This case raises a somewhat curious point. Mrs. Geertsema at her death had, under an English will, a general power of appointment over certain funds. She was at her death domiciled in Holland. She had been married to a Dutchman who was domiciled in Holland and was a Dutch subject, and on her marriage I suppose she became a Dutch subject and her domicil became a Dutch domicil.

(1) [1903] 1 Ch. 898.
(2) [1900] 1 Ch. 442.
(3) [1905] 2 Ch. 408.
(4) [1900] 1 Ch. 492.
(5) [1901] 1 Ch. 547.
(6) [1908] W. N. 161.
(7) 76 L. T. 462.

C. A. 1911 — PRYCE, *In re.* LAWFORD *v.* PRYCE. — Parker J.

Under these circumstances she made a will. That will is made in Dutch form, but it is executed and attested in the manner required by English law for the execution and attestation of a will. It was admitted to probate in England because it is good according to the law of the domicil, and there is no reason why, as far as relates to questions which are subject to the decision of an English Court, it is not a will to which the Wills Act would be applied.

By that will the testatrix declared that, whilst revoking her former dispositions, she appointed as her sole heir, of the whole of which the law in force at the time of her death should allow her to dispose in his favour, her husband, Mr. Gerard Geertsema. That is, in effect, a gift to her husband of all that she could leave in his favour. According to Dutch law there are certain parts of property which a man or woman cannot dispose of freely by will, but which devolve in a course determined by the Dutch law. It is, I think, in reference primarily to that Dutch law that the words are inserted which I have read, and which limit what is appointed to the husband to what the testatrix had power to appoint to him. Then she further declared that she appointed her husband as executor of her disposition or last will, giving him for that purpose all requisite power, mandate, and authority, including therein the right to take possession of all her real and personal properties according to law. That again seems to be the Dutch form of appointing an executor.

The question is whether, and how far, and in whose favour, that will operated to exercise the power of appointment. I think that all parties are agreed that it did operate to exercise the power of appointment. In the first place, it is a will executed and attested according to the English law, and therefore there is no reason why it should not be within s. 27 of the Wills Act; and, in the second place, there is evidence before me which I read in the following way. It is the evidence of a Dr. Henny, and appears to me to state that according to Dutch law the will, construed in accordance with that law, would exercise a general power of appointment. Therefore it seems to me that, in applying the English law, I may take it that this will, both because it is a will executed in accordance with English law, and

because, according to the law of the domicil, it is capable, properly construed, of exercising a general power of appointment, does exercise a general power of appointment which was reserved to Mrs. Geertsema by the English law. Nobody really has disputed that before me ; but it is argued that, according to the true construction of this will, there is an appointment to Mr. Geertsema of seven eighths of the fund and an appointment in favour of the person who would be entitled according to Dutch law of the other one eighth. On the other hand, it is argued on behalf of Mr. Geertsema that this is an appointment of all that the testatrix could appoint in his favour, and that he is entitled, therefore, to the whole fund over which the power existed.

In favour of the last proposition, namely, that Mr. Geertsema is entitled to the whole fund, certain cases have been quoted.

The first of the cases is *Pouey* v. *Hordern*. (1) In that case a domiciled Frenchwoman had under an English settlement a special power of appointment, and was held to be able to exercise that power in such a way as to dispose of the property in a manner which was inconsistent with her position according to French law. There is the opinion in that case of Farwell J., as he then was, that the same principle applies to a general power.

In the case of *In re Mégret* (2) Cozens-Hardy J., as he then was, approved and followed the opinion of Farwell J. as to the effect of an exercise of a general power of appointment.

The third case cited to me, which is I think to the same effect, is the case of *In re Bald*. (3) That was a case of a Scotch settlement creating a general power of appointment, which was exercised by a will in English form, it being doubtful whether the testator at the time of his death was domiciled in Scotland or in England. It was held that the Scotch law must govern, and that, inasmuch as by Scotch law the exercise of a general power of appointment does not make a fund assets for payment of debts, therefore the appointee was entitled to the fund without the debts being first paid out of it. In my opinion, I must follow the reasoning of those cases, and I cannot hold that, because in

(1) [1900] 1 Ch. 492. (2) [1901] 1 Ch. 547.
(3) 76 L. T. 462.

C. A. 1911 PRYCE, *In re.* LAWFORD *v.* PRYCE. Parker J

Dutch law the exercise of a power of appointment makes the fund over which the power is exercised assets for all purposes, therefore I must read the exercise of this power by a Dutch will as having been intended to make the appointed property assets for all purposes so as to be distributed, as to one eighth in this case, among those persons who would be entitled according to Dutch law.

It appears to me that the effect of the exercise of this power of appointment by the Dutch will is to vest the whole fund in the husband, to whom the appointment is made for his own benefit, so far as the testatrix could vest it, and that, having regard to the cases which have been cited, she could vest it in him wholly notwithstanding that according to Dutch law she was subject to certain disabilities in disposing freely of her estates in Holland. That being so, I hold that Mr. Geertsema is entitled to the whole.

F. E.

C. A.

Against this decision Mrs. Pryce appealed. The appeal was heard on May 9 and 10, 1911.

Martelli, K.C., and *Owen Thompson*, for the appellant. Mrs. Geertsema has by her exercise of the power of appointment made the appointed fund her assets for all purposes. The case is covered by *In re Hadley*. (1)

Parker J. considered that the case was governed by *In re Bald* (2), *Pouey* v. *Hordern* (3), and *In re Mégret* (4), and that the principle of those decisions had not been affected or overruled by *In re Hadley* (1), and he consequently followed those decisions. We submit that he was wrong and that the appellant is entitled to succeed.

Romer, K.C., and *R. Bisschop*, for the respondent. Where there is a general power of appointment by will and the donee exercises it, it is a question of intention whether the donee meant to take the appointed property out of the instrument creating the power for all purposes or only for the limited purpose of giving effect to the particular disposition expressed:

(1) [1909] 1 Ch. 20.
(2) 76 L. T. 462.
(3) [1900] 1 Ch. 492.
(4) [1901] 1 Ch. 547.

Farwell on Powers, 2nd ed. p. 237. It is true that the Court takes hold of the appointed property for the appointor's creditors and imputes to him an intention to pay his debts, and the appointee can only take subject to that. But the mere exercise of the power does not necessarily make the appointed property assets of the appointor for all purposes. In *Pouey* v. *Hordern* (1) a domiciled Frenchwoman had a special power of appointment under an English settlement, and it was held that she could exercise the power in such a way as to dispose of the property in a manner inconsistent with her position under the French law. There Farwell J. thought that the same principle applied to a general power; and the same view was taken by Cozens-Hardy J., as he then was, in *In re Mégret.* (2) *In re Bald* (3) is to the same effect.

There is nothing inconsistent with those decisions in *In re Hadley* (4), and they are not overruled by that case. The exercise of the power is independent of the limited testamentary capacity of the donee. The effect of the exercise is to vest the whole fund in the husband so far as the donee could vest it, and she could vest it in him entirely notwithstanding that under the law of her domicil she was subject to disability in disposing of her own property. The question is at what point of time it is to be taken that the power operates. A person having a power of appointment under a marriage settlement taking effect in England may exercise that power in a way in which he could not dispose of his property by the law of his matrimonial domicil: Dicey on Domicil, 2nd ed. p. 705; Westlake on Private International Law, 4th ed. p. 78. [They also referred to *Willoughby Osborne* v. *Holyoake.* (5)]

Austen-Cartmell, for the plaintiff.

J. F. H. Bethell, for other parties.

Martelli, K.C., in reply. Mrs. Geertsema has made the appointed property her assets for all purposes. The case is governed by *In re Hadley* (4), and Mr. Geertsema can only take seven eighths of the appointed fund. *Pouey* v. *Hordern* (1) does not

(1) [1900] 1 Ch. 492.
(2) [1901] 1 Ch. 547.
(3) 76 L. T. 462.
(4) [1909] 1 Ch. 20.
(5) (1882) 22 Ch. D. 238.

C. A. 1911 — PRYCE, *In re.* LAWFORD *v.* PRYCE.

apply to the present case. Farwell J. was there dealing with the question of the valid execution of the power, and not with its operation or the effect of the appointment when made. The learned judge who decided *In re Mégret* (1) was under a misapprehension as to the decision in *Pouey* v. *Hordern.* (2) *In re Bald* (3) is a very unsatisfactory decision, no authorities having been cited. It cannot be supported having regard to *In re Hadley.* (4)

Cur. adv. vult.

May 31. COZENS-HARDY M.R. Under the will of her father an English lady, Mrs. Geertsema, who was married to a Dutch gentleman, had, in the events which happened, a general power of appointment by will over certain funds in England. By Dutch law, her power of disposition was limited to seven eighths of her own property, her mother being entitled to one eighth as "legitimate portion." By her will, which has been admitted to probate in this country, she appointed as "her sole heir of the whole of which the law in force at the time of her death" should "allow her to dispose in his favour her husband." She also appointed him as executor, giving him for the purpose all requisite power, mandate, and authority, including therein the right to take possession of all her real and personal properties according to law. Now, according to the law of Holland, as proved by Dr. Henny, this exercise of the general power of appointment made the appointed property assets of the testatrix for all purposes. It has not been, and it cannot be, seriously denied that the power has been fully exercised in this sense, that the persons entitled in default of appointment are completely cut out. The real question is whether the testatrix had such complete disposing power as the law of England gives, or only such as the law of Holland gives. Parker J. has held that the husband is beneficially entitled to the whole fund.

The position of a donee of a general testamentary power of appointment over personal property is peculiar. If he does not exercise the power his creditors cannot claim the property. But

(1) [1901] 1 Ch. 547.
(2) [1900] 1 Ch. 492.
(3) 76 L. T. 462.
(4) [1909] 1 Ch. 20.

if he exercises the power, his appointee can take nothing until after his creditors have been paid: *Thompson* v. *Towne* (1); and the appointor's executor is the only person entitled to receive and give a good discharge for the property: *In re Hoskins' Trusts.* (2) But the appointment may, as matter of construction, be held not to indicate an intention to take the appointed property out of the instrument creating the power for all purposes, but only for the limited purpose of conferring a benefit upon a particular person. In such case—as for instance in the case of a specific appointment in favour of A. B., who predeceases the appointor—the property after payment of the appointor's debts will not pass as part of his estate—*In re Davies' Trusts* (3)—but will go to the persons entitled in default of appointment. If, however, there is not only the appointment of an executor, but also a dealing with his own property and with the fund over which he has a power of appointment as one mass, then the appointed property is made his own property for all purposes, so that in the event of the death of a beneficiary during his life the appointor's next of kin will take: see *Coxen* v. *Rowland* (4) and cases there cited. It follows that although the appointed property is always assets of the appointor so far as necessary to pay debts, it is not always assets of the appointor for all purposes. See the judgment of Farwell L.J. in *In re Hadley* (5), where he said: "The execution by a testator of a general power of appointment makes the appointed fund assets for the payment of his debts; his execution of the power is necessary in order to get rid of the rights of the persons entitled in default of appointment, but, when once made, operates as the acquisition of the fund by himself for the purpose of paying his debts in due course of administration, and then for the appointees, or, if they predecease him, for his own residuary legatees, or by way of resulting trust to the persons entitled in default of appointment, according to the true construction of his will." It is a question of construction whether, in any particular case, the appointor has, in effect, made the property his own.

(1) (1694) 2 Vern. 319; affirmed in 1694 in the House of Lords.
(2) (1877) 6 Ch. D. 281.
(3) (1871) L. R. 13 Eq. 163.
(4) [1894] 1 Ch. 406.
(5) [1909] 1 Ch. 20, 35.

C. A. 1911 PRYCE, *In re.* LAWFORD *v.* PRYCE. Cozens-Hardy M.R.

In the present case I think the lady has exercised the power in such a manner as to make the property her assets for all purposes. If so it seems to me to follow that her power of disposition over this property is neither greater nor less than over that which was strictly her own property. That power of disposition must depend upon the law of Holland, by which she could not beneficially dispose of more than seven eighths.

Parker J. based his judgment on three cases which it is necessary for me to consider. The first is *In re Bald* (1), a decision of Byrne J. It is very shortly reported and no authority is cited. A general power of appointment given by a Scottish instrument was executed by an English will. Under English law the appointed fund would be assets for payment of the appointor's debts, but under Scotch law it would not. Byrne J. held apparently that the appointment was specific and not such as to make the fund the appointor's own assets for all purposes, and accordingly he held that the fund went to the appointees, and was not assets of the appointor for the benefit of his creditors. The second case is *Pouey* v. *Hordern* (2), a decision of Farwell J. There the power was special and not general. The learned judge held, and, if I may respectfully say so, with perfect accuracy, that the will exercising the power was not a disposition of her own property, but was only a nomination of the persons whose names were to be inserted in the English settlement creating the power. But there are some observations which led me, in *In re Mégret* (3), to suppose, as Parker J. supposed, that Farwell J.'s view was that the same principle applied to a general as to a special power. If this statement is taken without any qualification, I think it is too wide. But on further consideration I am satisfied that the observations of Farwell J. were addressed only to a case where the appointment under the general power is direct to the object of the appointor's bounty, and not in such a manner as to make the fund part of her own estate to be dealt with in one mass as in *Brickenden* v. *Williams*. (4) The third case is *In re Mégret* (3), the facts of which are distinguishable from the facts in the present case.

(1) 76 L. T. 462.
(2) [1900] 1 Ch. 492, 495.
(3) [1901] 1 Ch. 547.
(4) (1869) L. R. 7 Eq. 310.

The appointment there was specific, in this sense, that it did not operate to make the fund a part of her own property for all purposes. My decision was, I think, correct on that view.

The proposition deduced from those cases in Dicey on Domicil, 2nd ed. p. 705, seems to me to be too widely stated. It should exclude cases in which the power has been so exercised as to throw the appointed fund into the appointor's own estate and to deal with the whole as one mass.

The present case seems to me to fall within the excepted class. The appointed fund is thrown into one mass with the appointor's own property. In this respect the English law is the same as the law of Holland.

With great respect to Parker J., I am unable to concur in his view, and I think this appeal must be allowed.

I prefer to base my judgment on the above reasons rather than upon the peculiar terms of the gift to the husband.

BUCKLEY L.J. Under the will of her father, who was an Englishman, this lady was entitled to a general power of appointment. His will was an English will. She married a Dutchman and acquired a Dutch domicil. She made a will. It is not in dispute between the parties that that will operated as an execution of the general power. She appointed her husband executor, and her will contains these words: "She appoints as her sole heir of the whole of which the law in force at the time of her death shall allow her to dispose in his favour her husband."

Under the law of England the execution of the general power operated to make the property the subject of the power assets of the testatrix, and, according to English law, directly the executor proved the will he became entitled to receive the appointed fund whatsoever might be the beneficial gifts which she had made, James L.J. in *In re Hoskins' Trusts* (1) says that it is "established beyond all question that where a feme covert or any other person having a general power of appointment over a fund of personalty,

(1) 6 Ch. D. 281, 283.

C. A. 1911 — PRYCE, *In re.* LAWFORD *v.* PRYCE. — Buckley L.J.

makes an appointment of the fund by will and appoints an executor, the executor, when he has proved the will, is entitled to receive the appointed fund." It is familiar law established at least one hundred and fifty years ago that in such case the appointed property becomes assets available for payment of the testator's debts. So far as the payment of creditors is concerned the executor takes not under but in defeasance of the appointment which the donee of the power has made in favour of the beneficiary. The creditor is not an object of the power. The executor takes, not because the donee has appointed to the beneficiary, but because the donee has exercised the power with the result that the executor becomes entitled to the property as assets of the testator to be applied in due course of administration, that is to say first in payment of debts and then for the beneficiary. My own decision in *In re Moore* (1) was based upon these considerations, and that decision was upheld in the Court of Appeal in the case of *In re Hadley* (2), a case which determined the point under the Finance Act in that way after a great conflict of judicial opinion. So much for the English law.

Then it is proved that the Dutch law is that by the exercise of the power the property the subject of the power becomes part of the estate of the appointor and is assets of the testatrix for all purposes. Whether under the one law or the other, therefore, the result is that when this lady exercised the power and died the property the subject of the power formed part of her estate and vested in her executor as executor.

The lady who had thus dealt with this property had a Dutch domicil. The property is movable and must by her executor be administered according to Dutch law. According to that law her mother is entitled to one eighth and the testatrix can only dispose of seven eighths. It results, in my opinion, that upon this ground in the first place the beneficial disposition in favour of the husband operated only to the extent of the seven eighths of which alone the testatrix was competent beneficially to dispose. The law of England could not give her as a Dutchwoman power to dispose beneficially of movables

(1) [1901] 1 Ch. 691. (2) [1909] 1 Ch. 20.

to an amount greater than that of which she by the law of her domicil was capable of disposing.

But it is said that there are decisions in Courts of first instance to the contrary. If that be so I am bound to say that I do not agree that they were rightly decided. But the cases are only these. First, *In re Bald.* (1) The general power was there contained in a Scottish instrument, and according to the Scottish law as proved the exercise by the donee of the general power did not make the appointed fund assets of the donee for payment of his debts, and this was true whether he was or was not a domiciled Scotsman. The testator had therefore upon those findings of fact not made the fund assets of his own, and the point in conflict in the present case did not arise. I may add further that no authorities were cited in the case, that it is very shortly reported, and cannot, I think, be regarded as of any great authority. *Pouey* v. *Hordern* (2) was a case of special power, not of general power, and therefore as a decision has no application to the present case. It is true that at the end of his judgment Farwell J. said something which obviously includes the case of a general power and is intelligible only if considered as addressed to the question of operation. For having consulted Farwell L.J. I am in a position to state that he agrees with me (referring to the last sentence of his judgment) that there are in the matter of execution as distinguished from operation no "different considerations." But it remains that he expressed no opinion as to the operation of an instrument by which the donee of a general power exercises the power. What the learned judge said comes to this. It is necessary first to look whether the power was executed, and for that purpose it is unnecessary to inquire whether the donee could dispose of the property. The donee may be an infant, or a married woman having no testamentary capacity. For the purposes of the execution of the power those considerations are irrelevant. After it has been found that the power has been executed there remains the question as to its operation. As to that he says nothing except (to expand his words) that if operation as distinguished from execution were in

(1) 76 L. T. 462. (2) [1900] 1 Ch. 492.

C. A. 1911 — PRYCE, *In re.* LAWFORD *v.* PRYCE. — Buckley L.J.

question (which it was not) different considerations would arise. With great respect to the learned judge who gave judgment in *In re Mégret* (1), and who is now presiding in this Court, I think he misunderstood Farwell J. when he said "Two points arise: first, whether the will was a good exercise of the power given by the settlement; next, whether the will was an effective disposition of the whole property. As I read the judgment of Farwell J. in *Pouey* v. *Hordern* (2), he really decided both points in favour of Mr. Theobald's contention." Farwell J. did, I think, decide the first point, but not the second. It is not necessary to consider whether *In re Mégret* (1) was rightly decided or not. The present case is distinguishable inasmuch as the property the subject of the power was in *In re Mégret* (1) the only property dealt with, while in the present case all the property of which the testatrix had power to dispose is dealt with in one mass. Upon this first point I hold that the appellant is entitled to succeed.

But there is a second point, and it is this. The lady by her will appointed in the terms which I have already read. She executed the power as respects the whole fund, she formed a mixed fund of that which was hers by way of property and that which was hers by way of power, and by appointing an executor she gave him the right to receive the whole fund. As to her beneficial dispositions of that which she had thus made her own they are by her language expressed to extend to so much only of the property as she could appoint having regard to the law (meaning the Dutch law) in force at the time of her death. Her disposition, therefore, was only of the seven eighths. Upon this ground again I think that the appellant is entitled to succeed. The result is that while the order below should stand so far as it declares that the will operated as an effectual exercise in favour of the husband as to the whole one fourth the next declaration ought to be, not that the husband is beneficially entitled to the whole, but that the husband is entitled to seven eighths of the one fourth, and that the mother is entitled to one eighth. It is said that there is some question not raised in the present proceeding as to the effect of a marriage contract between the

(1) [1901] 1 Ch. 547, 549. (2) [1900] 1 Ch. 492.

spouses, and words may therefore be added to the order to the effect that these declarations are without prejudice to any question arising on the marriage contract.

C. A.
1911
PRYCE, *In re.*
LAWFORD *v.* PRYCE.

KENNEDY L.J. I agree.

Solicitors : *Patersons, Snow, Kinder & Lawson, for Longueville & Co., Oswestry; Russell-Cooke & Co.; Wansey, Stammers & Co.*

G. A. S.

Applied. BARRATT *v.* GOUGH-THOMAS. [1951] 2 All E.R. 48.

EDMONDSON *v.* COPLAND.

JOYCE J.
1911
March 29, 30; *April* 27, 28; *May* 9.

[1910 E. 508.]

Mortgagor and Mortgagee—Notice by Mortgagee to pay off—Failure to pay on Date named—Subsequent Tender improperly refused—Mortgagee's Right to Fresh Notice or Six Months' Interest—Right to Interest subsequent to Tender—Readiness to pay—Keeping Money idle.

The defendant, a mortgagee, gave the plaintiff, the mortgagor, notice to pay off the mortgage, and that in default of payment within three months she intended to sell the property. Before the expiration of the three months some correspondence took place as to the execution of the reconveyance, and the matter was not completed on the day when the three months expired, but a week later the plaintiff tendered the amount of principal and interest to date, which the defendant refused to accept on the ground that the plaintiff must give a six months' notice to pay off or pay six months' interest in lieu thereof. The plaintiff then took out a summons for redemption, upon which the common order was made. The Master by his certificate found what was due upon the mortgage at the date of the tender, and that a good tender had been made by the mortgagor and refused by the mortgagee. He also fixed the time and place for payment, not allowing any interest subsequent to the tender. The plaintiff attended at the time and place with the money accordingly, but the defendant failed to attend. On a summons to vary the certificate :—

Held, that a good tender having been made, the plaintiff was not bound under the circumstances to give a fresh notice or pay six months' interest. But *held*, further, that the plaintiff, who had not actually set the money aside, was liable for interest from the date of tender to the date of actual payment, he having had the use of the mortgagee's money all that time.

Bartlett v. *Franklin* (1867) 36 L. J. (Ch.) 671, distinguished.

BY several indentures of lease dated in 1904 and 1905 certain

JOYCE J. EDMONDSON v. COPLAND. 1911

dwelling-houses were demised for long terms by the plaintiff James Edmondson to the plaintiff E. A. Sneath, as his nominee, for the purpose of creating ground rents.

By an indenture dated November 8, 1905, the plaintiffs joined in an assignment of the demised property to the defendant, Mrs. Copland, by way of mortgage to secure the repayment of the sum of 2500*l.* with interest at the rate of 5*l.* per cent. reducible to 4*l.* 10*s.* per cent. per annum as therein mentioned.

On December 9, 1909, the defendant's solicitors gave notice to the plaintiffs that she required them to pay off the principal and interest owing upon the mortgage, and that in default of that being done within three calendar months from the date of the notice she intended to sell the property or otherwise act as she might be advised. At that date the interest due under the mortgage up to and including October 20, 1909, had been duly paid.

Before the expiration of the three months some correspondence took place between the solicitors of the parties relating to the reconveyance, the mortgagee's solicitors insisting that some other party should execute the deed before the mortgagee. Under these circumstances the completion of the transaction did not take place on March 9, 1910, the day on which the three months expired.

On March 16 the mortgagors attended at the offices of the mortgagee's solicitors and tendered the amount of principal and interest due upon the mortgage up to that date. That tender was refused on the ground that, payment not having been made on March 9, the mortgagee was entitled to six months' additional interest in lieu of notice.

On March 18, 1910, the plaintiffs took out an originating summons for redemption and for an account. On July 8 the common order was made upon this summons, directing an account and ordering that, on payment of the amount found due within six months after the date of the Master's certificate at such time and place as should be appointed, the mortgaged property should be reconveyed.

On January 27, 1911, the Master made his certificate finding what was due upon the mortgage on March 16, 1910 (the date

of the tender), and that a legal tender of the sum due on that date had been made by the plaintiffs and refused by the defendant, and fixing February 27, 1911, as the date for payment at the Royal Courts of Justice, Strand. On that date the plaintiffs attended at the place named with the amount due, but the mortgagee did not attend.

On January 31 the mortgagee took out a summons to vary the certificate by adding to the sum found due by the Master a further six months' interest, and by reversing the finding as to a good tender having been made.

On the occasion of the tender on March 16, 1910, the plaintiff Edmondson obtained the money necessary to pay off the mortgage from his bankers, and did so again on February 27, 1911, and in the meantime he had deposited securities with his bankers upon which he was in a position to borrow at any moment.

On April 11, 1911, the principal due upon the mortgage together with interest to March 16, 1910, was by arrangement under the direction of the Court paid off without prejudice.

The summons now came on for hearing, and it was arranged that his Lordship's decision thereon should finally dispose of the action.

Younger, K.C., and *A. F. Topham*, for the defendant. The mortgagor having failed to comply with the notice to pay off the mortgage on or before March 9, 1910, the mortgagee was entitled to demand a fresh notice or six months' interest in lieu: *Day* v. *Day* (1); *Bartlett* v. *Franklin* (2); *In re Moss* (3); *Hill* v. *Rowlands* (4); Coote on Mortgages, 7th ed. p. 1174; Fisher on Mortgages, 6th ed. par. 1847. The fact that completion did not take place on the 9th was not due to any default on the part of the mortgagee. She was not bound to execute the reassignment before repayment. The words in the proviso for redemption in respect of reconveyance are "at any time thereafter," i.e., after payment.

[JOYCE J. referred to *Rourke* v. *Robinson*. (5)]

(1) (1862) 31 Beav. 270.
(2) 36 L. J. (Ch.) 671.
(3) (1885) 31 Ch. D. 90.
(4) [1897] 2 Ch. 361.
(5) [1911] 1 Ch. 480.

JOYCE J.
1911
EDMONDSON
v.
COPLAND.

That case shews that when the draft reconveyance has been settled and the debt adjusted and notice given fixing a day for payment, if the mortgagee is then not ready to hand over the reconveyance on tender duly made, he is not entitled to interest and costs subsequent to the date of tender.

The mortgagee is entitled to reasonable time for considering the reconveyance: *Wiltshire* v. *Smith.* (1) In any event the mortgagee is entitled to interest from the date of the tender because the mortgagor has not paid the money into Court or proved that he kept it lying idle: *Lutton* v. *Rodd* (2); *Gyles* v. *Hall* (3), and per Lord Macnaghten in *Bank of New South Wales* v. *O'Connor* (4); *Kinnaird* v. *Trollope.* (5) The Court will stay a sale by the mortgagee under his power of sale on payment into Court of the money due: per Kay J. in *Warner* v. *Jacob* (6); and that rule is based on the principle of natural justice that it is not right that the mortgagor should keep the money and not pay interest: Fisher on Mortgages, 6th ed. par. 1651. In *Smith* v. *Smith* (7) Romer J. said that if the mortgagee had himself demanded payment or taken steps to compel it the mortgagor was not bound to give notice or to pay interest in lieu thereof; but that does not apply where the mortgagor has not paid off according to the notice and the day for payment is indefinitely postponed. Here no steps were taken by the mortgagee to compel payment.

Hughes, K.C., and *E. Ff. Ball*, for the plaintiff. A mortgagee who gives notice to pay off must take the money when it is tendered. The notice in this case was a notice to pay at once, and the mortgagor is entitled to pay on any day after receipt of the notice with interest to the date of payment. The mortgagor proposed to pay on March 9, 1910, and could have paid after that date subject to this, that the power of sale would arise. On March 16, 1910, there was a good tender of principal, interest to date, and costs. *Day* v. *Day* (8), *Letts* v. *Hutchins* (9), *In re Alcock* (10),

(1) (1744) 3 Atk. 89.
(2) (1675) 2 Ch. Cas. 206.
(3) (1726) 2 P. Wms. 378.
(4) (1889) 14 App. Cas. 273, 283, 284.
(5) (1889) 42 Ch. D. 610, 618.
(6) (1882) 20 Ch. D. 220.
(7) [1891] 3 Ch. 550, 552.
(8) 31 Beav. 270.
(9) (1871) L. R. 13 Eq. 176.
(10) (1883) 23 Ch. D. 372.

In re Moss (1), and *Smith* v. *Smith* (2) were all cases in which the mortgagor gave notice to pay off. The decision in *Bartlett* v. *Franklin* (3) was no doubt right having regard to the particular circumstances of that case, but it is submitted that the judgment cannot altogether be relied on. The reporter of the case in 15 W. R. at p. 1078 draws attention in a note to 2 Burton's Cases and Opinions, p. 51, where the law is correctly stated.

Where the mortgagee has demanded or taken steps to compel payment the mortgagor can tender without notice: *Letts* v. *Hutchins* (4); *In re Alcock* (5); *Smith* v. *Smith* (2); *Bovill* v. *Endle* (6); Fisher on Mortgages, 6th ed. par. 1847.

It is admitted that a good legal tender was made here, and the mortgagor was under no necessity afterwards of keeping the money idle. It was sufficient that he was always ready and willing and in a position to pay: *Cliff* v. *Wadsworth* (7); *Smith* v. *Manners* (8); *Greenwood* v. *Sutcliffe* (9); Bullen and Leake, 3rd ed. p. 694; Seton on Decrees, 6th ed. p. 1926; Harris on Tender, p. 183.

There is no reported case, except *Gyles* v. *Hall* (10), where interest has not been stopped by tender, and in *Gyles* v. *Hall* (10) the mortgagor was not ready to pay.

The money was always available here, and it is for the mortgagee to shew that it was used, but in fact it was kept idle.

Younger, K.C., in reply.

Cur. adv. vult.

May 9. JOYCE J. This is an application to vary the certificate in a redemption suit. The whole case was fully argued before me on the hearing of the summons, and it was arranged that I should, by my judgment, finally dispose of the matter.

On December 9, 1909, notice to pay off the mortgage was given by the mortgagee's solicitors to the mortgagors, in what I understand to be the ordinary form, but it was not a notice to pay off at any particular date. It is a notice to pay off given in

(1) 31 Ch. D. 90.
(2) [1891] 3 Ch. 550.
(3) 36 L. J. (Ch.) 671.
(4) L. R. 13 Eq. 176.
(5) 23 Ch. D. 372.
(6) [1896] 1 Ch. 648.
(7) (1843) 2 Y. & C. Ch. 598.
(8) (1859) 5 C. B. (N.S.) 632, 636.
(9) [1892] 1 Ch. 1.
(10) 2 P. Wms. 378.

JOYCE J. 1911 EDMONDSON v. COPLAND.

a form to enable a mortgagee to exercise the power of sale if the notice be not complied with.

Now the three months mentioned in this notice expired on March 9, 1910, and before that date arrived, namely, on February 28, 1910, the mortgagee's solicitors wrote asking for the draft of the proposed reconveyance or transfer, adding that "It will be a convenience to our client to complete this week"—(but that would be before the 9th)—"the amount of the mortgage, principal, interest, and costs is payable on the 9th prox., and we will send you note of the costs prior to completion." On March 1 the mortgagors replied that their solicitors would have their instructions and they had every reason to suppose they would be in a condition to complete on the 9th. On March 4, which was a Friday, the solicitors of the mortgagors sent the draft reconveyance by post to the solicitors for the mortgagee, asking them, if they approved of it without material alteration, to engross it and get their client to execute, and stating that their clients, the mortgagors, would like to complete on the next Wednesday—that is, on March 9—and that they proposed to attend for that purpose. That letter of March 4 enclosing the draft reassignment was unfortunately misdirected to New Square instead of New Court, Lincoln's Inn, and consequently I understand this draft did not arrive until Saturday afternoon, when the office of the mortgagee's solicitors was closed. However, on Monday the 7th the solicitors of the mortgagee wrote: "We can receive payment of principal, interest, and costs on Wednesday next at 12 o'clock as you suggest, but as your clients will have to execute the deed before our client does so we think you can hardly expect the execution by our client of the reconveyance by that time."

This suggestion that the mortgagors and certain persons at whose request the conveyance or transfer was expressed to be made must execute before the mortgagee is to my mind simply absurd and ridiculous. Then on March 8 the solicitors of the mortgagors wrote: "We think that as you will not be able to get the reassignment executed by your client—(the mortgagee)—by 12 o'clock to-morrow, completion had better stand over until the deed is executed by her"; and saying that when they got the draft

back they would at once engross it, and so on. Then on the 9th, the day of the expiration of the three months, the solicitors of the mortgagee returned the draft reassignment, with a letter written after 12 o'clock on the 9th, the time of the appointment, saying: "We regret that you did not see your way to attend here to-day to repay the mortgage, and it is unfortunate that we did not receive the draft earlier than Saturday last. In order that your client might be within the terms of the notice given him, we sent a form of receipt for signature by our client for the amount due, which was ready for you to-day." And there was a postscript: "As our client is going abroad, we have engrossed one part of the document (which should be in duplicate we assume) so that we can complete in her absence; she had made arrangements for reinvestment, and is disappointed at not receiving payment."

This letter shews that the solicitors of the mortgagee on March 9 had in their possession a receipt signed by the mortgagee, and I think that, without giving themselves very much inconvenience, they might very well have had the reassignment or reconveyance executed by her too; but they had not, and so nothing was done on the 9th.

Now as to the draft reassignment, which did not reach the solicitors of the mortgagee possibly until Saturday afternoon. It was a perfectly simple document, no alteration was made in it, and it was returned in the condition in which the mortgagee's solicitors received it, with this note in the margin: "Note: Payment not having been made at the time appointed"—(of course, that meant March 9)—"the mortgagee's notice not having been complied with, six months' additional interest is payable in lieu of notice. See *Bartlett* v. *Franklin*, 36 L. J. (Ch.) 671."

The claim of the mortgagee to that additional six months' interest was disputed all along, and, in my opinion, quite rightly disputed. As I understand the law, no notice by the mortgagor, or payment of interest in lieu of notice, can be required where the mortgagee has demanded payment, or taken steps to compel payment. In *Bartlett* v. *Franklin* (1), the case cited by the solicitors of the mortgagee, the marginal note is: "A mortgage

(1) 36 L. J. (Ch.) 671, 672.

JOYCE J. 1911 EDMONDSON v. COPLAND.

was made or a definite term, and notice to pay off at the end of such term was given by the mortgagee. The mortgagor presented a petition to provide a fund to pay off the debt, which did not come on to be heard in time to pay the mortgagee before the expiration of the term :—Held that the mortgagee was entitled to six months' interest in lieu of fresh notice." Now I am not prepared to say that this decision in the circumstances of that case does not affect the question of notice to pay off when one is considering the date at which originally the money was due. But Malins V.-C. is reported in his judgment to have said: "It is not my experience that it makes any difference whatever whether the notice to pay off is given by the mortgagor or by the mortgagee. The rule is, that whenever there is default on the part of the lender"—which must be an error for "borrower"—"in payment of the debt on the day fixed for payment, he must give a fresh six months' notice of his intention to pay it off, or allow the mortgagee six months' interest in lieu of such notice." If in the passage I have just read "the day fixed for payment" means the day on which the money is by the mortgage deed covenanted to be paid, I agree; but if it means merely the day fixed for payment in some notice by the mortgagee I dissent. The report is a very unsatisfactory one in all respects, and I am of opinion that *Bartlett* v. *Franklin* (1) is no authority at all for anything beyond what was decided in the circumstances of that case. The reporter in the *Weekly Reporter* (2) appears to have had some doubt, because in a note he refers to the following passage in the second volume of Cases and Opinions, p. 51 :—"But when the mortgagee requires payment, all notice is out of the case: it is not notice, but a demand, which the mortgagee has a right to make, without any limitation of time whatever; and consequently, when the mortgagee has demanded his money, the mortgagor may bring it him the next day, and if he refuses to receive it he can no longer demand interest; for his demand of the money has made notice from the mortgagor wholly unnecessary."

Turning again to the correspondence, on March 15 the solicitors for the mortgagors wrote to the solicitors for the

(1) 36 L. J. (Ch.) 671, 672. (2) 15 W. R. 1077, 1078.

mortgagee and said that they were willing to complete and pay the money on the next day upon an undertaking being given by the solicitors for the mortgagee to obtain execution of the deed of reassignment. On March 16 there was a meeting at the office of the solicitors for the mortgagee and tender was made of the principal and interest up to that date. In the argument before me it was ultimately conceded that having regard to the authorities it is perfectly clear that on this occasion there was a good legal tender of the proper amount.

Well, this tender was refused, although it was a perfectly good tender. I think that when such a notice be given or demand made as there was here mere failure to pay within or on the day of the expiration of the three months does not render the mortgagor liable to pay an additional six months' interest or anything of the kind; and most certainly is this not so where the failure to pay happens or is occasioned in the manner in which it was in the present case. Therefore on this point as to tender and demand for further interest the mortgagee was wrong and has remained wrong throughout, and she certainly must pay the general costs of the action.

On March 18, 1910, an originating summons for redemption was taken out by the mortgagor: that summons asks for an account to be taken. On July 8 the common order was made directing an account to be taken and that, on payment within six months after the date of the Master's certificate at such time and place as should be appointed, the premises should be reconveyed. In my opinion that was a very unfortunate proceeding. The only point in question in the case was whether a good tender had been made on March 16. This should have been determined before any order was made. The Master made his certificate finding what was due on March 16, 1910, that is the date of the second appointment to pay off, and the date of the tender; also that legal tender of the sum named was made by the plaintiff to the defendant—to the mortgagee—on March 16 and refused; and he appointed Monday, February 27, 1911, between the hours of 12 noon and in the afternoon, and Room No. 138, Royal Courts of Justice, Strand, as the time when and the place at which the plaintiffs (the mortgagors) were to pay the sum that was

JOYCE J. 1911 EDMONDSON v. COPLAND.

named. On Monday, February 27, as I understand, the mortgagors attended, but the mortgagee did not attend, and nothing was done.

The certificate was perfectly right in form, but was wrong as to the amount fixed to be paid if any further interest was rightly and properly payable after March 16, 1910. The summons to vary the certificate was taken out by the mortgagee and asked to vary it by adding to the amount named an amount equal to interest on the principal to July 27, 1911—that is, six months after the date in February fixed for payment—and by reversing the finding of the Master as to a good tender having been made. What the summons asks for is wrong, except, perhaps, as to the question of interest from March 16, 1910, to February 27, 1911.

I now proceed to consider the question of this interest from March 16, 1910, to February 27, 1911, and afterwards until the actual payment of the principal, which was made some few weeks ago pending the proceedings. This is not the point raised by the summons, and I think very probably it is an afterthought on the part of the advisers of the mortgagee. It is contended that the mortgagor should have kept his money ready and idle, or dead, as it is sometimes termed, after the date of the tender. The law upon this is variously stated in the different books; but I think it clear that, even after tender improperly refused, it would be unreasonable that the mortgagor should have and make full use of the mortgagee's money without paying any interest. On the whole I think that, in order to avoid payment of interest after tender improperly refused, the mortgagor must either pay the money into Court, if there be any proceedings in which that could be done, or keep the money ready, and either make no profit, or, if he make profit,—e.g., if he get interest by placing the money on deposit—he must account for such profit to the mortgagee. Now what happened here was this, as I understand it; the money was never actually set aside. Possibly paying it into the mortgagor's current account at the bank, if the balance to credit always exceeded the mortgage money, would do. On two occasions, namely, for the purpose of tender on March 16 and for the purpose of the attendance on February 27, if I understand the matter rightly, the money was borrowed for a few hours

from the mortgagor's bankers, but without their charging any interest on the loan as they were entitled to do. The mortgagor says that afterwards, without actually borrowing the money from his bankers, he left security with them upon which he might have borrowed the money at any moment, and he left it for the purpose of being able to borrow the money without any notice. In other words, he contends that he kept a sufficient amount of security lying idle. Meanwhile I take it of course that the mortgagor used in his business the money borrowed from the mortgagee. Now I must observe that from July 8, which is the date of the order in the redemption action, until after the date of the Master's certificate there was no necessity for the mortgagor to keep the money ready nor any of his securities idle, because the money could not be called upon for some definite period to be fixed after the date of the Master's certificate. Further, the mortgagor need not have deposited the additional securities with his bankers until the money was actually required, and possibly during the few hours on the two occasions when the mortgagor had the money from the bankers for the purpose of making the tender. Upon the whole, and not without some doubt, I think that I cannot relieve the mortgagor from payment of interest in this case down to the date of the actual payment of the principal, he having for that time had the mortgagee's money and never having actually set aside the amount for the purpose of payment or having kept the money ready at the bank.

As before stated, I think the defendant, the mortgagee, must pay the general costs of the action, and though perhaps the certificate is not perfectly right, yet the summons to vary is so wrong that I see no reason for making any distinction with reference to the costs, or any part of the costs, of the summons to vary. The defendant must pay the plaintiff's costs throughout.

Solicitor for plaintiff: *F. J. Berryman, for Brennan & Brennan, Maidstone.*

Solicitors for defendant: *Paines.*

G. A. S.

NEVILLE J.

1911

June 21.

RAYNER *v.* CORPORATION OF STEPNEY.

[1911 R. 840.]

Local Government—Insanitary Dwellings—Closing Order—Statutory Form—Omission of Note to Form—Injunction—Local Government Order, January 11, 1910, *Form* 5—*Housing, Town Planning, &c., Act,* 1909 (9 *Edw.* 7, *c.* 44), *ss.* 17, 39, 41.

A local authority in exercise of their powers under s. 17, sub-s. 2, of the Housing, Town Planning, &c., Act, 1909, served a closing order upon the owner of a dwelling-house in their district on the ground that it was in a state so dangerous or injurious to health as to be unfit for human habitation. The closing order followed the statutory form prescribed by an Order of the Local Government Board made under s. 41 of the Act, except that it omitted the "note" at the foot of the form setting out s. 17, sub-s. 3, of the Act, which gives an owner served with such an order the right of appeal to the Board within fourteen days after the service of the order upon him:—

Held, that the "note" was a material part of the statutory form, and that its omission rendered the proceedings of the local authority invalid.

An injunction was accordingly granted restraining the local authority from proceeding to enforce the closing order.

MOTION.

This was an interlocutory application to restrain the defendant corporation from proceeding to enforce two closing orders under these circumstances.

The defendant corporation were the sanitary authority for their district, and the plaintiff was the owner of two houses known as Nos. 1 and 2, Regent's Place, Blossom Street, which were in the occupation of weekly tenants. Both houses were situate in the defendants' district.

On January 25, 1911, the defendants, acting in pursuance of their powers under s. 17 of the Housing, Town Planning, &c., Act, 1909, made an order (in the Act referred to as a closing order) in respect of each of the plaintiff's houses, prohibiting its use for human habitation until in their judgment it was rendered fit for that purpose. (1) Each order was served on the plaintiff on January 30, and, as the plaintiff did not appeal to the Local Government Board within the fourteen days prescribed by the

(1) See note (1) on p. 316, post.

section, the order became operative at the expiration of that period.

On April 21 the plaintiff applied to the defendants under sub-s. 6 of s. 17 of the Act to determine the closing orders on the ground that he had executed certain works that rendered the houses fit for habitation, but on May 22 the defendants served him with a notice declining to do so; and on May 23 they served him under s. 18 of the Act with notice of a meeting to be held on June 28 to consider the question of the demolition of the houses.

On May 29 the plaintiff issued the writ in this action claiming an injunction to restrain the defendants from proceeding to enforce the two closing orders, and now applied for an interlocutory injunction. The plaintiff deposed that from the time he was served with the closing orders until he consulted his solicitor in April he was unaware of his right of appeal to the Local Government Board. He also alleged that on February 8 an interview took place between himself and Dr. Thomas, the defendants' medical officer of health, at which it was arranged that he was to execute certain works to make the houses habitable, and that he had executed the works. The defendants alleged that they had strictly followed the procedure laid down by the Act and the rules made by the Local Government Board thereunder; and Dr. Thomas denied the alleged arrangement with himself.

Danckwerts, K.C., and *S. R. Earle*, for the plaintiff. The plaintiff has been misled. The order of January 25, which was served upon the plaintiff on January 30, does not comply with the form prescribed by the Local Government Board Order of January 11, 1910. (1) That form has at its foot a "note" telling an owner of his right of appeal to the Local Government Board. The note was omitted in the order served on the plaintiff and he was not aware of his right of appeal and the order became operative. Sect. 17, sub-s. 3, provides that notice of a closing order shall forthwith be served on the owner, but the Order of the Board does not prescribe any form of notice of a closing order. It only gives the form of a closing order, which is Form 5. The "note" referring to s. 17, sub-s. 3, is a most material part of the

(1) See note (2) on p. 317, post.

NEVILLE J. 1911 RAYNER v. STEPNEY CORPORATION.

closing order. It is analogous to the note indorsed on a writ or on an originating summons and is intended for the protection of the party being proceeded against. Its omission from the order served on the plaintiff was a most serious defect and invalidates their proceedings. Since the issue of the writ the plaintiff has appealed to the Local Government Board against the closing orders and is informed that his appeal cannot be entertained.

C. A. Russell, K.C., and *Whinney*, for the defendants. The real question is whether the "note" is part of Form 5, and it is submitted that it is not. The defendants have strictly followed the procedure prescribed by the Act and the Order of the Local Government Board.

[NEVILLE J. It is most important that persons served with any notice or order under the Act should know their rights. The note is proper for a form of notice of a closing order, but not for a closing order.]

Under s. 41 of the Act the Board can dispense with any notice. It is clear that the note is no part of a closing order that a local authority makes under s. 17. When one looks at Form 5 in the Local Government Board's Order, it is obvious that the note is not part of the form, which ends with the seal of the local authority and the signature of the clerk. Then a line is drawn. Then come the words "Directions for filling up and adapting this form" with references by numerals to the body of the form. Then another line is drawn. Then comes the note in question, and it cannot be said that that direction at the foot of the form is part of the closing order. There is nothing to prevent the Local Government Board from putting explanatory notices to their forms for the use of local authorities. The form of closing order is for the benefit of the local authority, and the Board have carefully excluded the note from the form of order, which is complete without it. The defendants have followed the form and are not in default unless it can be shewn that the document they are to serve under the section must include the note.

NEVILLE J. This is an interlocutory application, and I do not pretend that the form in question does not give rise to some

difficulty; but having regard to the nature of the provisions of the Act, I cannot but think that it was intended that Form No. 5, which is headed "Form of Closing Order," should include the note which refers to the right of appeal given by the Act of Parliament to an owner whose premises it is proposed to close on the ground that they are insanitary. In the first place, it seems only reasonable that the owner should be given some intimation of what his rights are under the Act. And I think that if the form of closing order, as has been argued, terminated at the place where the signature of the clerk of the local authority is to come, the order would in itself be misleading, because, although it is quite true it does refer to sub-s. 2 of s. 17 of the Act, that sub-section read by itself would mislead the person who sought information from it, because, although that sub-section, on the face of it, gives the local authority power to prohibit the use of the premises for occupation, that prohibition by another sub-section does not become operative until certain happenings, one of those being the expiration of the time which has been given to the owner to appeal to the Local Government Board. He is given what appears to me to be a very valuable and important right of appeal which would preclude, by any inadvertence, injustice being perpetrated upon him by the local authority, and I have no doubt that the intention of this form was that he should be apprised of the fact that he had that right of appeal. I think that is why the note is inserted in the form of the order. It is somewhat curious that Form 5 should be given as the form of the order, and not as the form of the notice of the order; but I take it that the explanation of that is this. The section provides for the making of the closing order, and then provides that notice of an order shall be given, and it seems to me that the interpretation put upon that section is that it means, not that notice that an order has been made shall be given, but that notice of the order itself shall be given—that is, notice of what is contained in the order—and therefore, by including in the order a note setting out certain rights of the owner, it is provided that the order shall not become operative unless it has been intimated to him in this way that he has the right of appeal. And I also think it is significant that, although

NEVILLE J. 1911 RAYNER v. STEPNEY CORPORATION.

it is called "Form of Closing Order," it obviously is not the form of an order to be made and registered in the archives of the local authority and there rest; but it is given as a form of an order which is to be communicated to the person affected by it, because it is headed "To" so and so, "owner of the dwelling house." It is not merely an order affecting him, but it is an order to be communicated to him, and I think that explains why the order is in the form it is. The note is put in for the purpose of informing the owner that he has a right of appeal. I think, therefore, that on this interlocutory application I must grant an injunction restraining the local authority from enforcing the orders until the trial of the action or further order, and then, if circumstances change, it will be open to the local authority to make an application to discharge the order. The costs of this application will be costs in the action.

The parties then agreed to treat the motion as the trial of the action, and by consent an order was made for a perpetual injunction with costs.

Solicitors: *E. Betteley; Alfred Turner.*

NOTES.

(1) The Housing, Town Planning, &c., Act, 1909, enacts:—

Sect. 17: "(1.) It shall be the duty of every local authority within the meaning of Part II. of the principal Act" (Housing of the Working Classes Act, 1890) "to cause to be made from time to time inspection of their district, with a view to ascertain whether any dwelling-house therein is in a state so dangerous or injurious to health as to be unfit for human habitation . . . .

"(2.) If, on the representation of the medical officer of health, or of any other officer of the authority, or other information given, any dwelling-house appears to them to be in such a state, it shall be their duty to make an order prohibiting the use of the dwelling-house for human habitation (in this Act referred to as a closing order) until in the judgment of the local authority the dwelling-house is rendered fit for that purpose.

"(3.) Notice of a closing order shall be forthwith served on every owner of the dwelling-house in respect of which it is made, and any owner aggrieved by the order may appeal to the Local Government Board by giving notice of appeal to the Board within fourteen days after the order is served upon him.

. . . . . .

"(6.) The local authority shall determine any closing order made by them

if they are satisfied that the dwelling-house, in respect of which the order has been made, has been rendered fit for human habitation.

"If, on the application of any owner of a dwelling-house, the local authority refuse to determine a closing order, the owner may appeal to the Local Government Board by giving notice of appeal to the Board within fourteen days after the application is refused."

. . . . .

Sect. 39 provides that the procedure on appeals to the Local Government Board shall be such as the Board may by rules determine.

Sect. 41: "(1.) The Local Government Board may by order prescribe the form of any notice, advertisement, or other document, to be used in connection with the powers and duties of a local authority or of the Board under the Housing Acts, and the forms so prescribed, or forms as near thereto as circumstances will admit, shall be used in all cases to which those forms are applicable."

(2) This Local Government Order is addressed to the several local authorities in England and Wales for the purposes of Part I. of the Housing, Town Planning, &c., Act, 1909, and, after reciting ss. 41 and 51 of the Act, sets forth the forms of the notices and other documents to be used in connection with the powers and duties of a local authority under the Act. The following was the form under s. 17, sub-s. 2:—

"FORM No. 5.

"FORM OF CLOSING ORDER.

"To[1] owner of the dwelling-house[2]

"Whereas under sub-section 2 of section 17 of the Housing, Town "Planning, &c., Act, 1909, it is the duty of the Local Authority if, on the "representation of the Medical Officer of Health, or of any other officer of "the Local Authority, or other information given, any dwelling-house "appears to the Local Authority to be in a state so dangerous or injurious "to health as to be unfit for human habitation, to make a Closing Order, that "is to say, an Order prohibiting the use of the dwelling-house for human "habitation until in the judgment of the Local Authority the dwelling-house "is rendered fit for that purpose;

"And whereas it appears to the[3] on the[4] that the above men-"tioned dwelling-house is in a state so dangerous or injurious to health as "to be unfit for human habitation:

"Now, therefore, We, the said[3] in pursuance of sub-section (2.) of "section 17 of the Housing, Town Planning, &c., Act, 1909, do, by this Our "Order, prohibit the use of the said dwelling-house for human habitation, "until, in Our Judgment, it is rendered fit for that purpose.

"Dated this day of 19 .

"(To be sealed with the Common Seal of the Local Authority.)

"Signature of Clerk of Local Authority . . . .

"Directions for filling up and adapting this Form.

"Insert—

"[1] Name, residence or place of business, and description, where known, "of owner.

NEVILLE J.
1911
RAYNER v. STEPNEY CORPORATION.

"[2] Such a description of the dwelling-house as may be sufficient for its "identification.

"[3] Description of the Local Authority.

"[4] 'Representation of the Medical Officer of Health' or 'representation "of the (*specify the officer*)' or 'on information given' (*specify the nature "and effect*)."

Note.

[Then followed s. 17, sub-s. 3, of the Act, giving an owner served with a closing order the right of appeal within fourteen days to the Local Government Board, and ss. 39 and 41 of the Act.]

H. L. F.

NEVILLE J.
1911
May 31; *June* 28.

In re COCKRELL'S ESTATE.

[1907 C. 1402.]

Solicitor—Costs—Charging Order—Property recovered or preserved—Proceeding—Sale—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

In a creditor's administration action the usual decree was made on July 1, 1907. On January 26, 1910, the plaintiff entered into a conditional contract for the sale of an outstanding piece of real estate for 383*l.*; the defendant the surviving executor opposed the confirmation of this contract as being at an undervalue, and the real estate was ordered to be sold with the approbation of the judge. At this sale, of which the surviving defendant had the conduct, the property fetched 400*l.*, which was paid into Court. On January 23, 1911, on further consideration, an order was made that a sum of 64*l.* found due from the defendants the executors should be set off against their costs, and the residue of their costs and those of the plaintiff should be paid out of the fund in Court. The defendants' solicitor now applied for a charging order for his costs, under the Solicitors Act, 1860, s. 28, on the fund in Court as being property recovered or preserved in the proceedings within the meaning of the Act:—

Held, that the sale was a proceeding within the meaning of the section, and that the money in Court must be regarded as property recovered in that proceeding, though in fact nothing more was recovered, having regard to the cost of the sale ordered, than would have been received under the conditional contract.

But *held*, that the order was in the discretion of the Court, and the Court would not make it in this case, because the order on further consideration practically ordered the same costs as those for which the solicitor asked for a charge to be paid to his client out of the fund.

THIS was an application by G. H. L. Blake, a solicitor, for a charging order on a fund in Court for certain costs, charges, and expenses in the following circumstances.

On May 6, 1907, the plaintiff, E. G. Pinkey, commenced a creditor's action against the two executors of J. W. Cockrell for the administration of the estate of their testator, who died on August 17, 1901, and on July 1, 1907, she obtained a decree for administration with the usual accounts and inquiries.

Before the commencement of this action all the debts due from this estate had been paid with the exception of the plaintiff's claim and two other small debts amounting to 37*l.* 3*s.* 6*d.* The only outstanding assets of the testator were certain property subject to a mortgage to the plaintiff and a third share in the Gorleston Land Company. One of the executors died in 1908, having previously become bankrupt.

On November 23, 1909, the Master certified the debt due to the plaintiff at 586*l.* 15*s.* after taking into account the mortgaged property. He also found that there was a balance of 64*l.* 9*s.* 6*d.* due from the executors to the estate.

On January 26, 1910, the plaintiff entered into a conditional contract for the sale of the share in the Gorleston Land Company for 383*l.* and brought the contract before the Master for confirmation. The applicant, who acted as solicitor for the defendants, objected to the proposed sale on the ground that the property had been valued for probate shortly after the testator's death at 1171*l.* The Master refused to confirm the contract and ordered the property to be sold with the approbation of the judge, the money arising from the sale to be paid into Court.

The surviving defendant had the conduct of the sale, and the property was put up for auction and sold for 400*l.* This sum was now in Court.

On January 23, 1911, the action coming before Swinfen Eady J. on further consideration, he made an order that the sum of 64*l.* 9*s.* 6*d.* found due from the executors should be set off against their costs of the action, that the balance of their costs and the plaintiff's costs should be taxed and paid out of the fund in Court, and that the residue of the fund in Court should be distributed among the three creditors.

The surviving defendant was in poor circumstances and unable to pay any costs, and this summons was taken out by Blake on March 8, 1911, asking for a declaration that he was entitled to a

NEVILLE J. charge upon the fund in Court, as being property recovered or preserved through his instrumentality for the defendants, or other the parties interested in the testator's estate, for the amount of his costs, charges, and expenses of and in reference to the action; and he asked that the same might be taxed as between solicitor and client and paid out of the fund accordingly.

1911

COCKRELL'S ESTATE, *In re.*

The application was made under s. 28 of the Solicitors Act, 1860. (1)

Ward Coldridge, for the applicant. The order for sale was made on the application of the plaintiff, but the sale was carried out by the applicant as solicitor for the surviving defendant. His work recovered the money in Court which is the proceeds of the sale. The charge is not upon the interest of any party, but on the property recovered, and may be made on the interest in that property of persons who were not parties to the suit and did not employ the solicitor: Seton on Judgments, 6th ed. p. 1092; *Greer* v. *Young* (2); *Birchall* v. *Pugin*. (3) In the Irish case of *In re White* (4) the charge was limited to costs necessarily incurred in recovering and preserving the property, and I only ask for an order in that form.

[NEVILLE J. The words of the Act seem to give you the costs of the action if they give you anything, but is a sale a proceeding?]

It is a realization, and realization is preservation within the meaning of the section. The defendant who actually employed the solicitor is insolvent, and if the application is refused he

(1) Sect. 28: "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of justice, it shall be lawful for the Court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding . . . ."

(2) (1883) 24 Ch. D. 545.

(3) (1875) L. R. 10 C. P. 397.

(4) (1885) 17 L. R. Ir. 223.

will not get paid for his work, though the creditors have got the advantage of it.

Borthwick, for the plaintiff in the creditor's action. What the applicant has to shew is that something has been recovered or preserved. The testator died ten years ago, and this action was brought by the plaintiff solely to recover this piece of property from the defendants; it had never been out of the defendants' possession, and now it is suggested that the defendants' solicitor recovered it because the defendants had the conduct of the sale under an order obtained by the plaintiff. There is no authority for a sale being held a recovery, except the Irish case, and that was decided on an ex parte application upon the authority of two English cases which did not support it, for *Bulley* v. *Bulley* (1) only decided that a successful defence to an ejectment action preserved the property which the plaintiff claimed, and in *Bailey* v. *Birchall* (2) it was the appointment of a receiver which was held to have preserved the property, not a sale. *Greer* v. *Young* (3) only decided that where a charge was declared it was paramount. In this case Swinfen Eady J. has refused the surviving defendant his costs and the solicitor cannot be in a better position than his client. In any case the power of the Court to declare a charge is discretionary, and this is not a case in which the Court will exercise the discretion.

Ward Coldridge in reply.

Cur. adv. vult.

June 28. NEVILLE J. In this case the applicant seeks a charge for his costs upon a fund in Court on the ground that it has been recovered by his instrumentality within the meaning of s. 28 of the Solicitors Act, 1860. The defendants for whom the solicitor acted were executors of a testator whose estate has been administered by the Court in a creditor's action. One of them became bankrupt and has since died, and the other is not in a position to pay any costs.

In the course of the proceedings the plaintiff took out a summons for the confirmation of an agreement to sell an asset

(1) (1878) 8 Ch. D. 479. (2) (1865) 2 H. & M. 371.
(3) 24 Ch. D. 545.

NEVILLE J. 1911 COCKRELL'S ESTATE, *In re.*

of the testator's consisting of a one-third share in the Gorleston Land Company at the price of 383*l*. The defendants' solicitor opposed this application, and an order was made in chambers for sale with the approbation of the judge.

The defendants had the conduct of the sale, and the property was put up for sale by auction and realized a sum of 400*l*., which has been paid into Court. It is upon this fund that the charge is claimed. The summons asked for a declaration in regard to the whole costs of the action, but the argument was practically confined to the costs incurred under the order for sale.

The first question is whether the costs of realization come within the section. This depends upon whether the sale was a "proceeding in any Court of justice," and whether the sale moneys were recovered through the instrumentality of the solicitor.

In my opinion "proceeding" is not confined to an independent proceeding, but extends to a proceeding in an action; and the sale was such a proceeding and is covered by the words of the section.

This appears to me to be in accordance with authority. In *In re W. C. Horne & Sons, Ld.* (1) Farwell J. declared a lien in respect of property recovered or realized by the instrumentality of a solicitor acting for a receiver in a debenture-holders' action; while in an Irish case of *In re White* (2), a case similar to the present, a lien was declared.

The matter is, however, within the discretion of the Court, and it is said that in the present case, inasmuch as the sale was brought about by the opposition of the solicitor, on the defendants' behalf, to the confirmation of the conditional contract, and the estate was no better off under the sale by auction, after taking the costs of sale into account, than under the conditional agreement, that discretion ought to be exercised adversely to the applicant. I must, however, I think, take it that upon the evidence properly before it the Court found that a sale by auction was the proper method of realization and that no blame attached to the solicitor for the course adopted. In the present case, however, the defendants who were in default were

(1) [1906] 1 Ch. 271. (2) 17 L. R. Ir. 223.

allowed their costs, the sum of 64*l.* 9*s.* 6*d.* due from them being treated as a payment on account. The rest of their costs, if any, would, I think, under the practice of the Court, be payable to their solicitor, the fund being in Court. The solicitor's costs of realization would be to a large extent, if not entirely, identical with those which on taxation would be allowed to the defendants.

Under the circumstances, ought the Court to exercise its discretion by declaring a lien in respect of these costs?

In Seton on Judgments, 6th ed. p. 1096, the practice is thus stated: "Where, however, the client is a debtor to a trust estate, as he can receive no costs until the debt is paid, and his solicitor can be in no better position, the trustees may set off the debt against the costs without regard to the lien; unless the Court, on the principle of salvage, should think fit to give a more extended charge."

If this means that the Court will direct a set-off of a trustee's costs against his liability to the estate except in cases where it thinks fit to give a charge under s. 28, I think it is right. Under that section, however, I think the decisions clearly shew that the right of the solicitor is not co-extensive with the right of the client, but is an independent right: *Bailey* v. *Birchall.* (1) In my opinion, however, the Court ought not to direct payment of the same costs out of a fund in Court twice over. And what I am asked to do here is to declare a lien in favour of the solicitor in respect of costs which, as I have already pointed out, in the main at all events have already been allowed to the defendants and partly paid. I think, therefore, that I cannot grant this application, and the summons must be dismissed with costs.

Solicitors: *Gribble, Oddie & Co.; Theodore Bell & Co., for Lucas & Wyllys, Great Yarmouth.*

(1) 2 H. & M. 371.

J. R. B.

PARKER J. 1911 April 27.

WILSON *v.* AMALGAMATED SOCIETY OF ENGINEERS.

[1911 W 912]

Trade Union—Objects of Union—Rules—Compulsory Levies to obtain Representation on Municipal Bodies—Ultra vires—Trade Union Act Amendment Act, 1876 (39 & 40 *Vict. c.* 22), *s.* 16.

The principle laid down in *Amalgamated Society of Railway Servants* v. *Osborne* [1910] A. C. 87, that trade unions as defined by Parliament have no power to levy contributions from their members for the purpose of securing parliamentary representation, extends also to securing representation on municipal and other local bodies (other than boards of guardians) at any rate where the levies on the members in aid of the funds are in effect compulsory.

Quære, whether the principle applies to the administration of funds for the purposes of parliamentary and municipal elections if the sums constituting the funds are voluntarily subscribed by members of the trade union.

The Amalgamated Society of Engineers was a registered trade union, whose rules (rule I. (3.)) stated its objects to be, by the provision and distribution of funds and by the other means thereinafter mentioned, on the conditions set forth in the rules, to protect and regulate the conditions of labour in engineering and other trades and the relation of the society's members with those trades; to promote the general and material welfare of its members; to assist them when out of work or in distressed circumstances; to assist such of them as desired it to acquire possession of their dwellings; to provide them with legal assistance in obtaining redress for accidents; to support them in case of sickness or accidents, and by superannuation; to provide for burials and loss of tools; to aid by federation other societies not coming under the preamble of the rules, and other trade societies having amongst their objects the promotion of the interests of workmen; and, by extending the society's system of investments for co-operative productive purposes, to assist in altering the competitive system of industry for a co-operative system "in order to secure a full share of the fruits of our labour." The rules also provided (rule III. (3.)) that branches of the society should

have power to take the votes of their members on the question of levying their members for affiliation to local trades councils, and also for the election or support of labour representatives on local public bodies if such representatives were bona fide members of a trade union, and, on the same conditions, for the support of representatives on any local infirmary board or committee, the levy not to exceed 1*s.* per member per annum; and (rule XIV. (8.)) that the society's executive council should consult the members, whenever they deemed it necessary, as to the propriety of raising or replenishing a parliamentary fund, and should from time to time make grants from such fund according to their discretion; and (rule XIV. (13.)) that the executive council should take such steps as might be deemed necessary to give effect to the principle of parliamentary representation which had been indorsed by the members, and that if a member who was a general officer was successful at the poll, the council should arrange for the performance of the work of his office either by providing him with an assistant or by declaring the office vacant, and should provide money from the parliamentary fund for the elected member's maintenance; and (rule XXV. (8.)) that members allowing their arrears of contributions to the society to exceed 1*l.* were to be excluded from all benefits of the society and from the privileges of its membership.

In this action against the society and its trustees the plaintiff alleged that the society levied subscriptions of 3*s.* per annum for the parliamentary fund on the plaintiff and the other members of the society, and in January, 1910, had made a special levy of 1*s.* per member in respect of the general election which then took place, and had paid moneys for parliamentary purposes to certain labour parties, national and local, and to two members of the society who were members of Parliament on account of their salaries as members of Parliament; and that the society was affiliated to the Labour party and that the two members of Parliament had accepted and signed the constitution of that party.

The plaintiff accordingly claimed declarations that the rules of the society as to parliamentary and local labour representation were ultra vires and illegal and that the defendants were not

PARKER J. 1911 WILSON v. AMALGAMATED SOCIETY OF ENGINEERS.

entitled to collect from the members of the society moneys for those purposes either in the shape of levies or voluntary subscriptions, and an injunction restraining the defendants from levying or collecting from the plaintiff and other members of the society and distributing moneys for any purpose other than the purposes referred to in s. 16 of the Trade Union Act Amendment Act, 1876 (1), or for any object other than the objects recited in rule I. (3.) of the society, and in particular from levying, as voluntary subscriptions or otherwise, or distributing moneys for any of the purposes set out in the provisions of the rules which were objected to, or paying moneys out of the funds of the society or moneys collected by it for the purpose of securing parliamentary or municipal representation.

The defendants, by their statement of defence, alleged that all the levies were quite voluntary on the part of the members who elected to pay them, and that since the beginning of the year 1910 separate accounts of these moneys had been kept, and that out of these moneys all the payments which were alleged to be illegal and ultra vires had been made. The defendants also, by their defence, offered to give a perpetual undertaking—in the terms offered previously on an interlocutory application—not to spend the funds of the society in paying the expenses connected with the collection of voluntary subscriptions for parliamentary or other purposes not within the society's powers, and also not to collect any such subscriptions under any terms suggesting that it was compulsory, or without making it clear that there was no legal obligation to pay it or any penalty annexed to its non-payment, and not to charge as arrears against any member of the society any sum in respect of such subscription, whether such member had objected in writing to its payment or otherwise. The defendants in their

(1) 39 & 40 Vict. c. 22, s. 16: "The term 'trade union' means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

defence also offered to pay the plaintiff's costs up to and including the time of the delivery of the defence.

At the trial it was shewn that members of the society had notice given to them that if they objected to pay the levies they must send a protest in writing to the secretary of the branch to which they belonged, and that the levies would be charged to the members who did not protest, and that the secretary of the branch was to keep a record of protests, and that the branches were required to send details to the council.

Spencer Bower, *K.C.*, and *Stuart Bevan*, for the plaintiff. So far as the case relates to the levying of subscriptions to secure and maintain parliamentary representation the plaintiff is entitled to relief on the authority of the decision of the House of Lords in *Amalgamated Society of Railway Servants* v. *Osborne.*(1) The principles of that case apply not only to parliamentary elections but also to municipal elections. Even if the levy is voluntary, it is illegal, for it involves an ultra vires distribution of the society's funds; but it is only in name that the subscriptions are voluntary, for a member who refuses to give his contribution to the ultra vires object is marked as an object of obloquy. The offer made by the statement of defence is embarrassing, as it does not in substance deal with the claims made in the action, and it is no answer to the plaintiff's claim to the costs of the action.

Buckmaster, *K.C.*, *Ellis Griffith*, *K.C.*, and *H. C. Davenport*, for the defendants. The society and its officers considered that each member was aware that he could either pay the levies or refuse to do so. The plaintiff may, nevertheless, have thought that the levies were compulsory, and we have always been willing that he should have any relief to which he would be entitled if that were the case. The defendants have offered the plaintiff all the relief to which he can be entitled. It is open to argument, which is entirely beside the case as it now stands, whether the society is entitled to apply for the purposes of parliamentary and municipal elections moneys voluntarily paid to it for those purposes. That is not the point now, and the

(1) [1910] A. C. 87.

PARKER J. 1911 WILSON v. AMALGAMATED SOCIETY OF ENGINEERS.

Court has not before it sufficient materials to enable it to decide the question. There is no evidence justifying the granting of an injunction. The only question is whether, having regard to the offers made by the statement of defence, the plaintiff should have the costs of any proceedings after it was delivered, and we submit that he should not.

Spencer Bower, K.C., in reply. There is no ground for penalizing the plaintiff as regards costs. After a defence denying everything alleged in the statement of claim the plaintiff was bound to go on with his action. The offers were only put into the defence to save costs. [He referred to *Jenkins* v. *Hope*. (1)]

PARKER J. I think it is reasonably clear, and as a matter of fact I do not think it is disputed by the defendant trade union, that this case is within the decision of the Court of Appeal and the House of Lords in *Osborne* v. *Amalgamated Society of Railway Servants*. (2) It follows from this that at any rate those portions of the rules of the society which purport to authorize the society to pay moneys and to apply moneys for securing parliamentary representation are ultra vires, and the plaintiff in the action asks for a declaration to that effect. After the decision in the *Osborne Case* (2) the present defendants, the trade union, altered their practice, with a view, as I gather, to ensuring that the moneys which they collected for their parliamentary fund should be rather in the nature of voluntary subscriptions than compulsory levies, and I am quite willing to accept the assurance of counsel that they acted bona fide in that matter; but, as a matter of fact, it appears to me to be reasonably clear, and again I do not think the defendants' counsel really dispute the fact, that the way they levied those subscriptions in fact made them levies of a compulsory rather than a voluntary nature, for instead of asking for subscriptions they notified the members that the subscriptions would be charged to them unless they dissented, and dissented in a particular form,

(1) [1896] 1 Ch. 278.

(2) [1909] 1 Ch. 163; on appeal, sub nom. *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A. C. 87.

which negatived collective action between the various members of the society; and, unless they objected in a particular way, they were charged in their books with the parliamentary levy, notwithstanding it was said to be voluntary; and that parliamentary levy, so charged, was set off against the benefits to which they were entitled under the other rules. So that in fact, unless they chose to object in a particular manner, they were charged with the levy without further or in fact any consent on their behalf. In my opinion that is really a compulsory levy, whatever may be said to the contrary, and, that being so, it appears to me the plaintiff is entitled, not only to the declaration, but to the consequent injunction which was granted in *Osborne* v. *Amalgamated Society of Railway Servants.* (1)

When the case first came before me it was on motion, and I think, if I recollect rightly, I pointed out the facts which I have already referred to, and intimated an opinion that the levies were not really voluntary, but were compulsory within the meaning of the *Osborne* judgment, and thereupon the defendants, again, I think, shewing their bona fides in the matter, offered certain undertakings which in my opinion do more or less give the plaintiff, indirectly, if not directly, the relief to which he is entitled, those undertakings being embodied in an order which I made on that occasion. The matter then proceeded in the usual way with regard to pleadings, and the defendants, so far as I have read their defence, do not admit that it is a case within the *Osborne* judgment, and do not admit that what they have done was by way of compulsory levy. At the same time they say they think the plaintiff may have been deceived in the matter, and they are willing to give a perpetual undertaking in the form of the undertaking given at the hearing of the motion, and pay his costs up to that date. The real question before me is whether that offer is sufficient to affect the discretion I have on a matter of costs. In my opinion it is not. The plaintiff was entitled, I think, to the declaration which he asked for, and he was entitled to the injunction in the form which was settled by the Court of Appeal in the *Osborne Case* (1), and though in one way or another,

(1) [1909] 1 Ch. 163; [1910] A. C. 87.

PARKER J. 1911 WILSON v. AMALGAMATED SOCIETY OF ENGINEERS.

directly or indirectly, he may have got an equivalent under the undertaking offered, I do not think an offer of that sort, which denies liability on points on which it is material for him and the persons he represents to have a declaration of the Court, is sufficient to deprive him of his right to costs. In my opinion, therefore, the proper order for me to make now is an order following as far as possible mutatis mutandis the terms of the *Osborne* judgment, an order declaring that those parts of the rules which are material for the present purpose are invalid and not binding on the plaintiff and other members of the society, and an injunction against levying moneys on the plaintiff or any other member of the society, or applying the moneys of the society, for any of the purposes in respect of which the rules are declared to be invalid. With regard to the particular form of the declaration the *Osborne* judgment form is confined to parliamentary representation and parliamentary funds, whereas in this case, under the particular rules in question, there is power or purported power for the society to levy moneys for the purpose of securing municipal representation or representation on other local bodies. It appears to me that every argument in the *Osborne Case* (1) which related to parliamentary representation is really applicable to municipal representation and representation on other local government authorities, and, I think, having regard to the fact that a declaration that the rules so far as they relate only to the parliamentary fund are invalid may raise a kind of presumption that in my opinion they are valid with regard to the fund for representation on municipal and other local bodies, I must also declare them invalid so far as they relate to securing municipal representation or representation on other local government bodies.

The defendants' counsel asked that there might be an exception in the case of elections to boards of guardians of the poor, and this was agreed to by the plaintiff's counsel.

PARKER J. With reference to what was said as to the position of boards of guardians, I think that those may be expressly excluded by saying "not including boards of guardians."

(1) [1909] 1 Ch. 163; [1910] A. C. 87.

The costs of the action were ordered to be paid by the defendants to the plaintiff, the defendants to have their costs of the plaintiff's motions to the Court of Appeal, the amount of which was to be set off against the costs payable to the plaintiff.

Solicitor for plaintiff: *C. T. Wilkinson.*
Solicitors for defendants: *Mills, Lockyer & Mills.*

F. E.

COPESTAKE *v.* WEST SUSSEX COUNTY COUNCIL.

[1910 C. 567.]

May 23, 24, 25, 26, 30, 31; *June* 1, 2, 21.

Injunction—Highway—Turnpike—Waste—Enclosure—Presumption—Evidence—Tithe Map—Turnpike Roads Act, 1822 (3 *Geo.* 4, *c.* 126), *ss.* 118, 124.

Where the lord of a manor encloses a strip of land by the side of a public highway and within a few feet only from the metalled portion of the road, then, whatever the presumption might have been before, a presumption thereafter arises that what he has left between the metal and his fence is dedicated to the public.

Any presumption as to the extent of a public right of way ought to be drawn with reference to all the circumstances existing at the time when the question as to the extent of the public right arises. It is not right to raise a presumption from a state of circumstances proved to have existed thirty or fifty years ago, ignoring all that has happened since.

A tithe map is not admissible as evidence of the extent of a public right of way, though it may be evidence that part of the land was not used at the time when the map was made for such purposes as to make it tithable.

The expression in s. 118 of the Turnpike Roads Act, 1822, "common or waste land on the side or sides of any turnpike road" means land not separated from the road by any existing fence; and "common or waste land" does not include land which has been enclosed from the road in part since the middle of the last century and in part from 1892, when a previous fence was erected.

ACTION for an injunction to restrain the defendants from pulling down a fence which the plaintiff had recently erected. The defendants admitted that they intended, unless restrained, to pull down the fence, and claimed to be entitled to do so in their capacity as highway authority, first, because it was erected on land over which the public had a right of way, and, secondly,

PARKER J. 1911 COPESTAKE v. WEST SUSSEX COUNTY COUNCIL.

because it was within 25 feet of the centre of the metalled portion of the road (formerly a turnpike road), which was illegal under ss. 118 and 124 of the Turnpike Roads Act, 1822. The plaintiff was owner of the land on both sides of the road and lord of the manor through the waste of which the road had been made. The facts are fully stated in the judgment.

Macmorran, K.C., Romer, K.C., Percy Wheeler, and *Guy Wormald,* for the plaintiff. The road in question is a "main road" within the meaning of that term as applied by s. 13 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), to certain disturnpiked roads; and as a main road it is, under s. 11, sub-s. 1, of the Local Government Act, 1888 (51 & 52 Vict. c. 41), maintainable and repairable by the county council, which, for the purposes of maintenance, repair, improvement, and enlargement of and other dealing with the road, has the same powers and is subject to the same duties as a highway board, and has the same powers as that board for preventing and removing obstructions and for asserting the right of the public to the use and enjoyment of the roadside wastes. By s. 11, sub-s. 6, of the same Act the main road is vested in the county council, but that vesting does not extend to roadside wastes: *Curtis* v. *Kesteven County Council.* (1)

The plaintiff has been the owner of the adjoining land since 1874, and is also the lord of the manor of Ewhurst, and he claims that the fence complained of has been erected on waste of that manor. The questions are (1.) whether he has erected the fence upon land which is part of the highway, and (2.) whether he has infringed s. 118 of the Turnpike Roads Act, 1822. The land enclosed is overgrown with trees and brushwood to such an extent that it is now impassable as a road. The plaintiff or his predecessors planted a considerable number of these trees, and from time to time the plaintiff or his tenants have cut down the trees. Any presumption relating to roadside waste being part of the highway is rebutted by shewing that the land could not, by reason of its character, be used in an ordinary way for public passage, and if this were an ordinary highway case

(1) (1890) 45 Ch. D. 504.

there would be enough here to rebut any presumption that the highway extended beyond the line of the fence.

PARKER J.
1911
COPESTAKE v. WEST SUSSEX COUNTY COUNCIL.

But, this road being a main road and a disturnpiked road, s. 2 of the Annual Turnpike Acts Continuance Act, 1865 (28 & 29 Vict. c. 107), applies to it ss. 118 and 124 of the Turnpike Roads Act, 1822. By s. 118 of that Act, if any person makes or causes to be made certain things, including a hedge or fence, on or at the side of any turnpike road, so as to reduce the breadth or confine the limits thereof, or makes certain things, including a hedge or fence, on any common or waste land on the side or sides of any turnpike road, within the distance of 30 feet if within three miles of any market town, or if beyond that distance within 25 feet, from the middle or centre thereof, or ploughs, harrows, or breaks up the soil of any land, or in ploughing or harrowing the adjacent lands turns his plough or harrow in or upon any land within the distances aforesaid from the middle or centre of any turnpike road, or makes any other encroachment on any turnpike road within the distances aforesaid, he is subjected to a pecuniary penalty, and the trustees or commissioners having the care of the road are empowered to remove the obstruction at the expense of the person who caused it. Then s. 124 says how the centre of the road is to be ascertained. The defendants suggest that, apart from the question whether the land enclosed forms part of that over which the public have any right to go, the mere erection of a fence within 25 feet of the centre of the metalled road would be an offence within s. 118; but that would be an extraordinary result, for in this case, as in the case of other turnpike roads, the distance between the ditches on either side is in many cases less than 50 feet.

Moreover, the part of the section which relates to the ploughing up of adjacent lands would, if the defendants are right, make it unlawful for a man to plough up such of his own land as lay within 25 or 30 feet of the centre of the made road. Although there is no reported decision as to the construction to be placed on s. 118 of the Act of 1822, there are cases on similar provisions in the Highway Acts (Highway Act, 1835, (5 & 6 Will. 4, c. 50), s. 69; Highway Act, 1864 (27 & 28 Vict. c. 101), s. 51), which shew that in order to bring a case within

PARKER J. 1911 COPESTAKE v. WEST SUSSEX COUNTY COUNCIL.

those provisions it must be proved not only that the fence or other offending thing is within the prescribed distance from the centre of the road, but that it is actually on the road or on some part of the way which the public have the right to use: *Evans* v. *Oakley* (1); *Easton* v. *Richmond Highway Board.* (2) These decisions assist one in construing s. 118 of the Act of 1822, which means that the public are not to be interfered with in their right of passage over that part of the road, whether metalled or greensward, which the public have the right to use.

The plaintiff, as the lord of an ancient manor, claims that the land which he has enclosed is part of the waste of the manor, and he and his predecessors have from time to time made conveyances of waste lands at the side of the road which have been similarly fenced in. Assuming the lands are waste of the manor, there is no presumption that the fence behind them is the highway fence; in such a case the presumption is that the fence which supports the enclosed lands was put up to fence them in when they were enclosed from the waste. [They also referred to *Field* v. *Thorne.* (3)]

Upjohn, K.C., Boxall, K.C., and *J. G. Wood*, for the defendants. This road was disturnpiked after the date of the Annual Turnpike Acts Continuance Act, 1865, and by s. 2 of that Act s. 118 of the Turnpike Roads Act, 1822, is incorporated, so that for this purpose it is not repealed by the Statute Law Revision Act, 1888. The plaintiff alleges that these roadside strips are waste of the manor. If so, his fence is on waste at the side of an old turnpike road, within 25 feet from the centre of the road, and is illegal under s. 118. If they are not waste there is nothing to rebut the presumption that they are subject to highway rights from bank to bank as between the obvious boundaries of the road. Further, the Court will presume that these strips, if originally waste, were purchased by the trustees of the road, or that in some other way they became subject to public rights of highway. Under s. 118 of the Act of 1822 it is our duty to pull down this fence because it is on waste of the manor and within 25 feet of the centre of the road; and we can do that now,

(1) (1843) 1 Car. & K. 125. (2) (1871) L. R. 7 Q. B. 69.
(3) (1869) 20 L. T. 563.

although the old fence ought to have been pulled down long ago. Laches does not affect public rights of highway. That is so even on the assumption that the present fence is in the same position as the old fence, for it is proved that that was within the 25 feet.

At one time these matters were governed by the Highway Act, 1773 (13 Geo. 3, c. 78), and the Turnpike Roads Act, 1773 (13 Geo. 3, c. 84), which contained similar provisions and were explained in *Lowen* v. *Kaye*. (1) The law as to turnpike roads was altered by the Turnpike Roads Act, 1822, and s. 118 applies to this case. Sect. 124 defines the centre of the road to mean the centre of the metalled part of it. The Highway Act, 1835, s. 69, forbids fences within 15 feet of the centre of a road and provides a summary remedy, but does not apply to turnpike roads: Pratt and Mackenzie's Law of Highways, 16th ed. p. 240; *Coggins* v. *Bennett* (2); Summary Jurisdiction Act, 1848, s. 11; *Keane* v. *Reynolds* (3); *Evans* v. *Oakley* (4); *Chapman* v. *Robinson* (5); *Easton* v. *Richmond Highway Board*. (6)

The tithe map is admissible as evidence to shew the position of the roads and the enclosures. It is an official document which came into existence under the Tithe Act, 1836 (6 & 7 Will. 4, c. 71): *Attorney-General* v. *Antrobus*. (7) Enclosures have to be shewn on a tithe map because they may became tithable: Tithe Act, 1548.

Under the Commons Act, 1876, s. 31, notice must be given of a claim to enclose waste, and there is no evidence that such notices were given, so it must be assumed that the fence is on waste. The presumption then is that all the land outside the enclosure is dedicated to the public and the fence is the boundary of the road: *Neeld* v. *Hendon Urban Council* (8); *Harvey* v. *Truro Rural Council* (9); *Evelyn* v. *Mirrielees* (10); *Chorley Corporation* v. *Nightingale*. (11)

Macmorran, K.C., in reply, referred to *Reg.* v. *Ramsden* (12),

(1) (1825) 4 B. & C. 3.
(2) (1877) 2 C. P. D. 568.
(3) (1853) 2 E. & B. 748.
(4) 1 Car. & K. 125.
(5) (1858) 1 E. & E. 25.
(6) L. R. 7 Q. B. 69.
(7) [1905] 2 Ch. 188.
(8) (1899) 81 L. T. 405.
(9) [1903] 2 Ch. 638.
(10) (1900) 17 Times L. R. 152.
(11) [1906] 2 K. B. 612; on appeal, [1907] 2 K. B. 637.
(12) (1858) E. B. & E. 949.

PARKER J. *Reg.* v. *Berger* (1), and *Countess of Belmore* v. *Kent County Council.* (2)

1911

COPESTAKE v. WEST SUSSEX COUNTY COUNCIL.

Cur. adv. vult.

June 21. PARKER J. This is in the nature of an action for trespass, the relief claimed being an injunction to restrain the defendant council from entering on the plaintiff's land and pulling down a fence which the plaintiff has recently erected. The defendant council admit that they intend, unless restrained, to pull down this fence, and they say that they are entitled so to do in their capacity as highway authority, first, because the fence is erected on land over which the public have a right of way, and, secondly, and alternatively, because it is within 25 feet of the centre of the metalled portion of the main road (formerly a turnpike road) leading from Horsham on the north to Henfield on the south, to which, as a road disturnpiked since the Annual Turnpike Acts Continuance Act, 1865, ss. 118 and 124 of the Turnpike Roads Act, 1822, are still applicable.

The fence in question commences at its northern end a little south of the entrance gate to Shermanbury Grange at a point where a culvert crosses the road from east to west, and then runs southward for some third of a mile parallel with, and at a distance of about 15 feet from, the centre of the metalled portion of the road. For the purpose of this case it may be divided into three sections—first, the northern section, extending from the culvert above mentioned to a point a few feet south of the commencement of Challen's Wood; secondly, the middle section, commencing at the termination of the northern section and extending to a point a few feet north of the southern corner of Challen's Wood; and, thirdly, the southern section, commencing a few feet north of the southern corner of Challen's Wood and continuing to the southern end of the fence. It will be found that somewhat different considerations apply to each of these three sections.

The road, so far as it adjoins the fence in question, is situate on what was formerly waste of the manor of Ewhurst, of which the plaintiff is the lord, and, except to the limited extent and for

(1) [1894] 1 Q. B. 823. (2) [1901] 1 Ch. 873.

the limited purposes to and for which the road is vested in the defendant council as highway authority, the site thereof, as also the land on either side thereof, between the metalled road and the old enclosures (which are also within this manor), belong to the plaintiff, or, as to certain portions on the west side of the road, to persons who derive title through him as lord of the manor. The distance between the fences of the old enclosures east and west of the road varies considerably. The metalled portion of the road is about 20 to 24 feet wide, and there are strips of land on either side of the metalled portion between it and the fences of the old enclosures. The fences of the old enclosures to the east of the road consist of a continuous bank on which there are still traces of an old hedge. This bank, though, roughly speaking, more or less parallel with the road, recedes, and forms, as it were, two small bays, one opposite the northern section and the other opposite the southern section of the plaintiff's new fence. The effect of the plaintiff's new fence is to enclose these bays, and also a narrow strip of land along the middle section of the fence next to Challen's Wood. On the roadward side of the bank which forms the fence of the old enclosures is a deep ditch which, from the culvert where the fence commences down to a spot in close proximity to the southern corner of Challen's Wood, is an important feature in the scheme of drainage of the estate, and has been kept clear by the plaintiff and his predecessors in title. The bays I have mentioned have always, so far as living memory goes, been overgrown with trees and brushwood which have from time to time been cut by the plaintiff and his predecessors for their own profit. There is, however, some doubt as to the distance from the road at which these trees or brushwood from time to time commenced. This has, no doubt, varied to some extent. I am satisfied, however, that as far as living memory extends there has, by reason of the existence of trees and brushwood, been no possibility of the exercise of any right of way on the part of the public over the greater part of, if not all, the land to the east of the northern and southern sections of the plaintiff's new fence. Further, it appears that about the middle of the last century the then lord of the manor planted the northern bay with fir trees, and erected

PARKER J. 1911 COPESTAKE v. WEST SUSSEX COUNTY COUNCIL.

a fence between the fir trees he so planted and the road. This fence commenced about the spot at which the plaintiff's new fence commences and followed, approximately, the same line ending in the bank of Challen's Wood a few feet south of its northern corner. This fence, which was in the nature of a dead hedge, was repaired from time to time, but not very efficiently. In 1892 it was replaced by a post and rail fence which, so far as the evidence goes, was in the same position as the earlier fence.

In my opinion, when the lord of a manor encloses a strip of land by the side of a public highway and within a few feet only from the metalled portion of the road, then, whatever the presumption may have been before, a presumption thereafter arises that what he leaves between the metal and his fence is dedicated to the public. Further, in this case I think there is evidence of the actual exercise by the public of a right of way up to the fence erected in 1892. If, therefore, the plaintiff's fence in the northern section is nearer the road than the fence erected in 1892, there has been an encroachment on the road. If this case had depended on oral evidence only I should, I think, have come to the conclusion that the plaintiff's new fence was throughout its northern section somewhat set back from the position of the 1892 fence. But Mr. Chapman in 1892, when the post and rail fence was almost finished, made a survey for the highway authorities, who apparently doubted the legality of what was being done, and he deposed in the box to the accuracy of such survey, which he produced. Even allowing for inaccuracies due to the smallness of scale, it appears from this survey that the plaintiff's new fence is, at any rate for some portion of its northern section, somewhat nearer the road than the 1892 fence, and this is confirmed to some extent by the ordnance map of 1896, and by the plan annexed to the plaintiff's particulars. It may be suggested that the 1892 fence was subsequently altered, but there is no evidence of this, though it is difficult to determine accurately the position of the 1892 fence. I have come to the conclusion that at any rate for some part of its length it was somewhat further from the road, that is, further east, than the plaintiff's new fence, which, therefore, to some extent encroaches on the road.

With regard to the southern section of the plaintiff's new fence, I find that it replaced a post and rail fence which was erected in 1892 at the same time as the fence along the northern section. There is no evidence that prior to 1892 there was any fence along this section, but I think on the evidence that the plaintiff's new fence is somewhat further from the road than the fence it replaced, and does not, therefore, encroach on the road in this section.

With regard to the middle section of the plaintiff's new fence, the facts are less easy to determine. There certainly was never any fence here at all until such new fence was erected. The plaintiff's case is that the land between the new fence and the ditch I have mentioned was always overgrown with brushwood to such an extent as to preclude the possibility of public passage. I have come to the conclusion that this was not so. No doubt the brushwood on the bank of Challen's Wood grew out across the ditch towards the metalled road, and at places sprung up on the road side of the ditch. Before Challen's Wood was cut, some thirty years ago, it was much thinner than it is now by reason of the overhanging branches of the trees in Challen's Wood. Until the plaintiff bought the property the road authority, and thereafter the plaintiff himself, used to trim back the brushwood which extended over the ditch and that which at places grew on the road side of the ditch. This gave the appearance of an irregular hedge with grassy nooks running back as far as the ditch, and there is evidence of the exercise by the public of a right of way all along Challen's Wood as far as the ditch except at those places where the brushwood had sprung up. I do not think that isolated spots where brushwood or trees grow on the margin of public roads can be considered as exempt from public rights which are proved to have been exercised elsewhere over such margin. I come to the conclusion, therefore, that in its middle section the plaintiff's new fence is an encroachment on the public right of way, and I arrive at this conclusion independently of any presumption as to the extent of the public right.

It was argued at the trial that though there is no evidence of the exercise by the public of any right of way beyond the pos and rail fences which were erected in 1892 so as to enclose the

PARKER J. 1911 COPESTAKE v. WEST SUSSEX COUNTY COUNCIL.

northern and southern bays to which I have referred, I ought, nevertheless, to presume that the public right of way extends into these bays up to the fences of the old enclosures. In my opinion any presumption as to the extent of a public right of way ought to be drawn with reference to all the circumstances existing at the time when the question as to the extent of the public right arises. The position of the metalled portion of a road, the ownership of the soil of the road, and of the land on either side thereof between the metalled portion and the old enclosures, the nature of such land, its levels with reference to the road, and the enclosed land on either side, its actual user, and many other circumstances are or may be relevant in considering what presumption arises. But it would not, in my opinion, be right to raise a presumption from a state of circumstances proved to have existed thirty or fifty years ago, ignoring all that has happened since. If the extent of the public right east of the metalled portion of the road next the northern section of the plaintiff's new fence had been questioned in the middle of last century it is impossible to say what material facts might have been then proved. Then living witnesses might have deposed to the existence of older fences enclosing the northern bay of which we now know nothing. We do know of the existence of fences enclosing the northern bay since the middle of last century, and in my opinion this fact cannot be ignored in considering what presumption now arises. In my opinion the nature and user of the land constituting the northern and southern bays in question, coupled with the fact that they have for very many years been enclosed from the road, make it impossible to presume that the public right of way extends further eastward than the fences erected in 1892. What I have said about the northern and southern bays does not, however, apply to the road next the middle section of the plaintiff's new fence. I am not at all sure that if it were necessary to decide the question I should not hold that the public right must be presumed to extend to the ditch next Challen's Wood, even if there were no evidence of the exercise of such right.

A question also arose at the trial as to the admissibility in evidence of a tithe map certified by the Tithe Commissioners as

a first-class map. This map shews the road at the locus in question as bounded on either side by the fences of the old enclosures, and was tendered as proof that the public right of way extended over the bays in question. In my opinion it is not admissible as evidence of the extent of the public right, though I think it may be evidence that the bays were not at the time it was made enclosed from the road, or used for such purposes as to make them tithable. It was the business of the persons responsible for the making of this map to ascertain what land in the parish was, and what was not, tithable. It was not their business to define the extent of public rights of way.

With regard to the 118th and 124th sections of the Turnpike Roads Act, 1822, it is unnecessary in the view I take of the facts to decide whether in construing these sections I ought to follow the cases cited in argument with reference to the corresponding sections of the Highway Acts. Construing the 118th section most favourably to the defendant council it cannot be relied on unless the land on which the plaintiff's fence is erected was, at the date of erection, common or waste land on the side of the road. I think "on the side of the road" means not separated from the road by any existing fence, and that common or waste land does not include land which has been enclosed from the road in part since the middle of last century, and in part from 1892. Even if, as suggested, the plaintiff's new fence can be considered in its northern and southern sections merely as a continuation of the old fences which enclosed the northern and southern bays, still the defendant council has, in my opinion, failed to prove that these old fences were erected on common or waste ground within the meaning of the sections, or that at the date of their erection they were within 25 feet from the metalled portion of the road.

Having given the best consideration I can to the evidence before me, I decide the case in favour of the plaintiff as to the southern section of the fence, and in favour of the defendants as to the middle section. With regard to the northern section of the fence I think it is an encroachment on the public right so far, but so far only, as it is situate westward of, that is nearer to, the roadway than the fence erected in 1892.

PARKER J. 1911 COPESTAKE v. WEST SUSSEX COUNTY COUNCIL.

With regard to the precise form of order, I think it will be sufficient first to grant an injunction with regard to the southern section; secondly, reciting that the Court is satisfied that the public right of way along the middle section extends up to the ditch on the road side of Challen's Wood, to make no order as to such middle section; and, thirdly, to declare that the northern section of the fence is an encroachment on the public right, and unlawful so far, and so far only, as it is situate westward of the line of fence erected in the year 1892, reserving liberty to either party to apply if, as I hope will not be the case, they fail to come to an agreement on the matter.

Solicitors: *Biddle, Thorne, Welsford & Sidgwick; Nicholson, Patterson & Freeland, for F. R. de Montmorency, Lewes.*

H. C. R.

PARKER J. 1911 *June* 27.

In re HAMMOND. BURNISTON *v.* WHITE.

[1911 H. 36.]

Will—Construction—Gift to Wife "during her widowhood"—Bigamous Marriage—Condition—Definition of Period—Knowledge of Parties.

The plaintiff Mrs. B.'s husband disappeared in 1894 and was supposed to be drowned, though it was found impossible to trace him. In 1903 Mrs. B. went through the ceremony of marriage with the testator. All the circumstances were explained to the testator and he and Mrs. B. believed that their marriage was perfectly valid, although there might be a slight risk of B. being still alive. They lived together as man and wife until the testator's death in 1906. By his will the testator gave to his wife his household effects "during her widowhood and after her decease or second marriage" he gave them to his daughters. He also gave her the use of a house and an annuity upon similar terms. After the testator's death the plaintiff lived in the house and received the annuity till the autumn of 1910, when it was discovered that B. was still alive. Mrs. B. brought this action for a declaration that she was the person described in the will as the wife of the testator and was entitled as his widow to all the rights and interests given by the will during widowhood:—

Held, that the words "during her widowhood" did not import a

condition, and that the plaintiff was entitled to enjoy the property until she died or married again.

THE plaintiff, whose maiden name was Elizabeth Hodgson, married Andrew Burniston on November 25, 1873, and they had issue one child, a daughter. The plaintiff and her husband and daughter lived together till the death of the daughter in 1894. Her death had a bad effect on her father's health; his mind became unhinged, he lost his memory, neglected his business, and wandered aimlessly about the country, till in December, 1894, he left his wife and home without making any preparations or taking any luggage. A rumour was spread about that he had been drowned on his way to Ireland. His wife was ill at the time, but her mother made many inquiries about him; these inquiries were afterwards continued by Mrs. Burniston, but no trace of him was discovered. Mrs. Burniston went to live with her cousin at Bradford, and there met the testator John Hammond, who in the year 1900 proposed marriage to her. The evidence proved that all the circumstances were explained to him; he was eager for the marriage and Mrs. Burniston was reluctant to consent on account of the doubts that existed about her husband's death. There was a delay of more than two years, and on March 21, 1903, Mrs. Burniston and the testator went through the ceremony of marriage at Bradford. At this time (as was held by Parker J.) the parties were justified in assuming that Burniston was dead and they believed he was dead; though they both realized that there was a possibility of his being alive, in which case their marriage would be invalid. The plaintiff lived with the testator as his wife and was accepted as his wife by all their friends and acquaintances until his death on April 9, 1906.

By his will, dated March 13, 1906, he appointed his wife and two of his nephews to be the executors and trustees of his will and proceeded to bequeath all his consumable stores to his wife Elizabeth absolutely, and also bequeathed all his plate, linen, &c., furniture, and household effects to her "during her widowhood, and after her decease or second marriage" he bequeathed the same to his daughters in equal shares. He devised his freehold house to his trustees upon trust to allow his "wife to reside therein or to receive the rent thereof during her widowhood and

PARKER J
1911
HAMMOND, *In re.* BURNISTON *v.* WHITE.

from and after her decease or second marriage upon trust to dispose thereof as part of my residuary real estate." He then gave some legacies including one of 25*l.* to his wife Elizabeth. He devised and bequeathed all the residue of his real and personal estate to the trustees upon trust for sale and conversion, and clauses 6 and 7 of the will were as follows: "Out of the net income of my estate my trustees shall during the widowhood of my wife pay the rates and taxes the cost of insurance against fire and the cost of repairs payable on account of the said dwelling-house number 135 West Park Road aforesaid and pay to her 1*l.* 15*s.* 0*d.* per week and if they in their discretion think it necessary for her welfare pay to her further sums not exceeding 50*l.* in any year and my trustees shall during the widowhood of my wife pay to each of my said daughters 5*s.* per week and after the death or second marriage of my wife pay to each of them 1*l.* 2*s.* 6*d.* per week and my trustees shall use the residue of such income in reducing any mortgage debts which may be charged on my unsold real estate or any part thereof until the whole shall have been discharged out of such income as aforesaid or otherwise and if either of my daughters shall die before the whole of the said mortgage debts shall have been discharged my trustees shall dispose of the income of 5*s.* or 1*l.* 2*s.* 6*d.* per week as the case may be which she would have received if living in the manner in which they would have disposed of the income of her share of the trust funds if the whole of the said mortgage debts had been discharged.

"7. My trustees shall subject as aforesaid hold the trust funds upon trust for my said daughters in equal shares subject as next hereinafter provided."

After the testator's death the plaintiff lived in the house and received the income provided for her by the will till the autumn of 1910, when it was discovered that Burniston was still alive. The trustees other than the plaintiff thereupon called upon her to leave the house and declined to pay her income, and she brought this action for administration of John Hammond's estate, payment of arrears of income, an order for continuance of payment of income, and a declaration that she was the person described in the will as the wife of the testator and was entitled

as his widow to all the rights and interests given by the will to continue during her widowhood.

Romer, K.C., and *C. E. Brackenbury*, for the plaintiff. The plaintiff is entitled to all the benefits given to her by the will just as if she really were his widow. The expression "during the widowhood of my wife" is not equivalent to "on condition that she is my widow," but fixes the period during which payment is to be made: *In re Wagstaff* (1); *Lepine* v. *Bean* (2); *In re Lowe.* (3) *In re Boddington* (4) turned on special facts. There is no case precisely in point, for here both the parties thought they were legally married. The form of the gift over shews what the testator meant by widowhood.

Martelli, K.C., and *Harold Newell*, for the defendants. This case is not covered by authority; it is a question of construction, and the Court is asked to speculate on what the testator would have done if he had known that Burniston was alive. It is clear on the evidence that both parties thought he was dead. *In re Wagstaff* (1) turned on the circumstance that the testator knew his marriage was invalid and he could not leave a widow, and that it could not be supposed that by the gift he intended nothing but mockery. There is no such circumstance here.

[PARKER J. It is curious that the testator should use the expression "after the second marriage of my wife." On his view of the facts it would have been her third marriage.]

The construction of the original gift is not controlled by the gift over. There was no moral obligation on the testator to provide for the plaintiff if her husband was alive, and it cannot be supposed that he intended to provide for Burniston also, which may be the result if this gift is upheld. The moral obligation to make provision for a widow depends upon the fact that she is the testator's widow: *In re Boddington* (5), where it was held that such a gift imported a condition.

Romer, K.C., in reply.

(1) [1907] 2 Ch. 35; on appeal, [1908] 1 Ch. 162.
(2) (1870) L. R. 10 Eq. 160.
(3) (1892) 61 L. J. (Ch.) 415.
(4) (1884) 25 Ch. D. 685.
(5) 25 Ch. D. 688.

PARKER J. 1911 HAMMOND, *In re.* BURNISTON v. WHITE.

PARKER J. stated the facts, and continued. In construing this will I am entitled to bear in mind the particular circumstances touching the first marriage of the lady and the disappearance of her husband, and, that being the case, the main question I have to decide is this: when the testator gives the lady furniture and the use of a house and an annuity "during her widowhood," am I to construe the expression "during her widowhood" as importing a condition or as simply describing the time during which she is to enjoy the gifts? It appears from authorities which have been quoted that reference to widowhood may import a condition, and here, if it does so, the condition is of this nature: the testator says "I am fully aware of the nature of my relationship with the lady who is living as my wife, and that if Burniston is alive she is not my wife; I am only providing for her if she is my wife, and if she is not my wife I give her nothing." I think it is clear that a provision of that sort would not only be capricious but exceedingly unjust to the lady, and, unless I am forced by the actual words of the will to do so, I ought to lean in the other direction and not to import such a condition. On the other hand, if I can construe this expression as meaning merely the period during which she is to enjoy what he has given her, no difficulty arises. I am of opinion that I can so construe it having regard to the circumstances and to the fact that in each case when a gift is made to her it is followed by the words "and after her decease or second marriage." From those words I draw the inference that "widowhood" means "until she dies or marries again," the words "second marriage" being construed not strictly but as meaning "other marriage." So read the will is perfectly sensible and one which one would imagine the testator would make in the circumstances, whereas if it imports a condition it would be capricious and unjust. I do not think the cases which have been cited affect this will one way or the other. *In re Boddington* (1) was a case in which the circumstances were entirely different from those before me. There in the full belief that the lady was his wife the testator made a will whereby he gave her an interest "so long as she shall continue my widow and unmarried," and

(1) 25 Ch. D. 685.

after the date of the will she herself instituted proceedings in which the marriage was declared null and void by the Divorce Court. Lord Selborne referred to that fact as shewing that any moral obligation on the testator to provide for her was thereby absolutely removed. Here, on the contrary, if I am to consider moral obligations, the moral obligation on the testator to provide for the lady would be strengthened if the marriage turned out to be invalid. In each of the other cases undoubtedly the testator knew that his marriage was not a valid marriage, and in those circumstances different considerations would arise. In the present case, except that there was knowledge that there was a risk that Burniston might still be alive, the parties had reason to believe that their marriage was valid. This is the only case in which the question has arisen where the testator thought he was safe. In all the circumstances and having regard to the terms of the will I think the expression "during her widowhood" was not intended to import a condition but to define the period during which she was to enjoy the gifts. In these circumstances the lady is entitled to the benefits given to her by the will until her death or future marriage.

Solicitors: *F. B. Brook, for A. V. Hammond, Bradford; Sherwood, Baker & Hart, for M. Banks Newell, Bradford.*

H C. R.

WARRINGTON J.

1911

July 13.

In re JAMES.

JAMES *v.* JONES.

[1911 J. 698.]

Practice—Parties—Administration—Real Estate—Creditor—Action by Single Creditor—Rules of the Supreme Court, 1883, *Order* III., *r.* 4; *Order* XVI., *r.* 9; *Order* LV., *rr.* 3 *and* 4—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 2.

If a creditor desires administration of real estate of a person who died after the date of the Land Transfer Act, 1897, it is no longer necessary that he should sue on behalf of all the creditors.

THIS was an originating summons issued by a single creditor of J. D. James, who died in 1906, asking, inter alia, for the administration of his estate, which consisted partly of real estate.

H. Terrell, K.C., and *C. Church*, for the respondents, took the preliminary objection that, inasmuch as there was no trust for conversion, the plaintiff ought to have sued on behalf of himself and all the creditors.

Cave, K.C., and *P. F. Stokes*, for the summons. If administration of real estate is desired by a creditor it is no longer necessary in the case of the estate of a person who died after the passing of the Land Transfer Act, 1897, that he should sue on behalf of himself and all the other creditors: Rules of the Supreme Court, 1883, Order III., r. 4; Order XVI., r. 9; Order LV., rr. 3 and 4: *Worraker* v. *Pryer* (1); *In re Greaves*. (2)

Clauson, K.C., and *J. G. Wood*, for other respondents, supported the objection and referred to Mitford's Pleadings in Chancery, 5th ed. p. 192.

WARRINGTON J. In this case the plaintiff asks, as a creditor, for administration of real estate, and he is suing as an individual, not on behalf of himself and all other the creditors of J. D.

(1) (1876) 2 Ch. D. 109. (2) (1881) 18 Ch. D. 551.

James. The question is whether to enable a creditor to obtain an order for the administration of real estate it is still essential that he should sue as representative of all the creditors. It is said that since the Land Transfer Act, 1897, it is no longer necessary that a creditor should sue on behalf of all the creditors, and in my opinion that proposition is sound. The history of the subject appears from Mitford's Pleadings in Chancery, 5th ed. p. 192, to be that in order to get administration of personal estate one creditor could always sue by himself. With regard to real estate, which it was sought to make assets for the payment of debts, all the creditors had to be before the Court, and the plaintiff could only sue on behalf of himself and all other the creditors. Then came the Improvement of the Jurisdiction of Equity Act, 1852, which enabled a creditor to obtain administration of personal estate by summons without filing a bill, and also of real estate which was devised upon trust for sale. It was decided in *Worraker* v. *Pryer* (1) in substance that at that time an individual creditor still had no right to obtain administration of real estate without suing on behalf of all the creditors except in the cases mentioned in the Act of 1852. The next step was the Land Transfer Act, 1897. By s. 1, sub-s. 1, of that Act real estate owned by persons who die after the date of the Act is to vest in their personal representatives as if it were a chattel real; and by s. 2, sub-s. 2, "all enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate." The result of that is that administration of real estate in the case of persons subject to the Land Transfer Act, 1897, can now be

(1) 2 Ch. D. 109.

WARRINGTON J.
1911
JAMES, *In re.* JAMES *v.* JONES.

sued for by a creditor without stating that he sues on behalf of all the creditors. The summons is therefore regular.

Solicitors: *Helder, Roberts, Walton & Giles; Taylor, Rowley, Lewis & Davis, for W. S. Gustard, Newport, Mon.; Sismey & Cook, for Dauncey & Co., Tredegar.*

H. C. R.

NEVILLE J.
1911
July 5, 6.

In re BLADON.
DANDO *v.* PORTER.

[1911 B. 1292.]

Settled Estate — Tenant for Life and Remainderman — Freehold Licensed Premises—Extinction of Licence—Compensation—"Persons interested in the licensed premises"—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *ss.* 2, 3.

Where licensed premises form part of a settled estate, and the licence is extinguished under the provisions of the Licensing Act, 1904, the proportion of the compensation paid to the tenant for life or to the trustees of the settlement (as the case may be) represents capital moneys of the estate.

It makes no difference if there are no trustees. In either case the tenant for life is not entitled to the compensation for his sole benefit, and the analogy of an insurance against fire by a tenant for life, not under obligation to insure, does not apply.

ADJOURNED SUMMONS.

James Bladon by his will, dated February 17, 1874, gave and bequeathed to his wife Harriet Bladon "the whole of his estate and effects" for her life, and after her death to the plaintiff John Dando; and the testator, after bequeathing an annuity, proceeded: "after the death of my said dear wife the said effects bequeathed to her by this will shall be given to such of her relations as she may appoint in writing for that purpose." And the testator appointed his wife and Andrew Hair executors of his will.

The testator died on February 27, 1874, and his said will was proved by both the executors therein named.

Harriet Bladon subsequently married Isaac Dando, by whom

she had a daughter and two sons, all of whom attained the age of twenty-one.

Andrew Hair died in 1900.

Harriet Dando survived her second husband, and by her will, dated June 18, 1907, after appointing her daughter the defendant Harriet Porter, the wife of Charles Porter, and Henry Thomas, her executors, appointed and directed that all her estate and interest under the said will of James Bladon should be held in trust for her children, the defendants Harriet Porter, Ernest Dando, and Leonard Dando.

Harriet Dando died in February, 1911, and her said will was proved by the defendant Harriet Porter alone, Henry Thomas having renounced probate.

Part of the real estate of James Bladon consisted of a freehold public-house, called the Queen's Inn, at Pontypool, in Monmouthshire, and was on lease. In 1907 the licence of the inn was extinguished under the provisions of the Licensing Act, 1904, and 450*l.*, the proportion of the compensation allocated to the freeholder of the inn, was paid to Harriet Dando. This summons was taken out by John Dando, the remainderman, to determine whether the 450*l.* formed part of Harriet Dando's estate, or whether he was beneficially entitled to it as forming part of the real estate of the testator, James Bladon.

Percy Wheeler, for the plaintiff. There is no direct authority on the point, but in *Noakes* v. *Noakes & Co., Ld.* (1) it was held, following *Law Guarantee and Trust Society* v. *Mitcham and Cheam Brewery Co.* (2), that, as between a brewery company and its mortgagees, the compensation moneys payable to the brewery company as the owner of the licensed premises in respect of which the licence had been refused represented part of the mortgaged property and were capital moneys payable to the mortgagees, and this decision was approved in *Dawson* v. *Braime's Tadcaster Breweries, Ld.* (3) The principle of those decisions governs this case. The compensation is the difference between the value of the licensed premises with the licence and

(1) [1907] 1 Ch. 64. (2) [1906] 2 Ch. 98, 104.
(3) [1907] 2 Ch. 359.

NEVILLE J. 1911 BLADON, *In re.* DANDO *v.* PORTER.

their value without the licence. It is no part of the profits arising from the licensed premises. It is in fact a realization of part of the settled property and represents capital moneys which now belong to the plaintiff, as the remainderman.

W. H. Gover, for the defendants. A tenant for life is entitled to all casual profits that accrue during the time of his tenancy: *Brigstocke* v. *Brigstocke*. (1) The licence cannot be regarded as part of the fee simple of the licensed premises, and this compensation was in the nature of a casual profit. There is nothing in the Licensing Act to take it away from her, and she has paid out of her income the deductions which the licence-holder was under s. 3 of the Act entitled to make from his rent—*In re Smith* (2)—and has received a smaller rent by reason of the licence having been taken away. The brewery cases cited are distinguishable. There the licensed premises were included in and were a material part of the mortgage securities. In *Gaussen* v. *Whatman* (3) a tenant for life, under no obligation to insure and not impeachable for waste, was held entitled to the insurance moneys of a fire policy he had kept up, and in *In re Lacon's Settlement* (4) a tenant for life, without impeachment for waste, was held entitled to retain damages for dilapidations that he recovered from a lessee. The same principle applies here.

[NEVILLE J. Is there any case where trustees or a tenant for life were under obligation to insure, and the tenant for life has been held entitled to the insurance moneys of property subject to the trusts of the settlement?]

No. *In re Quicke's Trusts* (5) is the nearest case. There the tenant for life was an infant and the insurance was made by the trustees under s. 42 of the Conveyancing Act, 1881, and the remaindermen desired the premises rebuilt under the Act of 1877. But the Conveyancing Act does not apply to heirlooms, and in that case the infant tenant for life was held entitled to the insurance moneys of settled heirlooms insured by the trustees under s. 18 of the Trustee Act, 1893, which confers a general power on trustees to insure buildings "or other insurable property," and

(1) (1878) 8 Ch. D. 357, 363.
(2) [1906] 1 Ch. 799, 802.
(3) (1905) 93 L. T. 101.
(4) Ante, p. 17.
(5) [1908] 1 Ch. 887, 894.

these latter words have been held to include heirlooms: *In re Earl of Egmont's Trusts.* (1) In the present case the tenant for life was under no obligation to keep up the licence of the inn, and it is submitted that she comes within the same principle as a life tenant who is not bound to insure or to repair. There were no trustees here, and no hand to receive the compensation but that of the tenant for life.

NEVILLE J. The question I have to decide depends on the proper construction of the Licensing Act, 1904. Sect. 2 of that Act provides that in certain cases on the non-renewal of a licence compensation shall be paid to the "persons interested in the licensed premises," and if there are more than one person interested, then they can agree among themselves as to their respective shares, but in default of agreement the compensation is to be divided amongst them in such shares as may be determined by quarter sessions. Now here the licence of premises, which are part of a settled estate, was refused on grounds involving compensation. Part of the compensation was paid to the licence-holder and the balance was paid to the tenant for life of the property, there being no trustees of the settled estate. The question is whether the tenant for life received that sum for her own benefit or as trustee for herself and those entitled in remainder. It seems to me that the absence of trustees makes no difference, and that the compensation was paid to the tenant for life not for her own personal benefit, but for the benefit of herself and of all other persons interested in the settled estate. The result is that the amount of the compensation must be invested and the income only received by the tenant for life. But it has been argued that this ought not to be so, because the premiums or charges that go to make the compensation fund are by s. 3 of the Act payable out of the rents received by the tenant for life, whether she will or no. That, however, is a statutory obligation imposed by the Legislature on the tenant for life, and the Legislature has not given her any corresponding rights, except as one of the persons interested, to the compensation money to be paid. I think that the premiums

(1) [1908] 1 Ch. 821.

NEVILLE J. 1911 BLADON, *In re.* DANDO *v.* PORTER.

or charges deducted by a licence-holder out of his rent cannot be compared to a voluntary payment on the part of the tenant for life. It has, however, already been decided, as between mortgagor and mortgagee, in *Noakes* v. *Noakes & Co., Ld.* (1) and *Dawson* v. *Braime's Tadcaster Breweries, Ld.* (2), that this compensation is payable to the mortgagee as capital moneys, and I think the principle of those decisions covers this case.

Mr. Gover's arguments proceeded to a considerable extent on the analogy of premiums paid on insurance against fire by a tenant for life. I do not think that analogy is a true one, but as the point has been raised I will state my opinion about it. Where a life tenant is under an obligation to insure or trustees have power to insure, whether the insurance is of real estate or chattels, I think that if there are successive interests in the property the insurance is for the benefit of the persons successively entitled and does not belong to any one of them. In the case of a voluntary insurance by a tenant for life, apart from the Act of 1774 (14 Geo. 3, c. 78), I think the tenant for life is alone entitled to the proceeds of insurance against fire, and that would also be so in the case of chattels. As to the power of trustees to insure, it may be that under s. 42 of the Conveyancing Act, 1881, the power being given during the infancy of the tenant for life, the insurance made by them would be for the benefit of the infant tenant for life alone, but that does not appear to be so under the Trustee Act, 1893. Under s. 18 of that Act all trustees have power to insure, and I think that where they insure settled property they insure for the benefit of all persons interested and hold the insurance as part of the settled property.

Solicitors: *Kinch & Richardson, for Lyndon Moore & Cooper, Newport, Mon.; W. J. & E. H. Tremellen, for H. J. Thomas, Cardiff.*

(1) [1907] 1 Ch. 64. (2) [1907] 2 Ch. 359.

H. L. F.

ASHOVER FLUOR SPAR MINES, LIMITED *v.* JACKSON.

EVE J.
1911
June 21, 27; *July* 7.

[1910 A. 841.]

Damages—Interest—Trespass on Mines — Judgment — Referee—Report—Date from which Interest to run—Practice—Judgments Act, 1838 (1 & 2 *Vict.* *c.* 110), *ss.* 17, 18.

By a consent order dated July 18, 1910, an action for an injunction to restrain a trespass on mines and for damages was compromised on the terms that it should be referred to a special referee to ascertain the damages, and the defendants were to pay the amount so found. On June 1, 1911, the special referee reported that 1515*l.* was payable by the defendants to the plaintiffs. Upon motion by the plaintiffs that the referee's report might be adopted, the question was raised as to whether interest was payable on the damages, and from what date:—

Held, that as the order of July 18, 1910, was not one whereby a sum of money was payable by the defendants to the plaintiffs within s. 18 of the Judgments Act, 1838, inasmuch as a further order was necessary, interest on the damages was not payable from the date of the order.

Borthwick v. *Elderslie Steamship Co.* [1905] 2 K. B. 516, distinguished.

But *held* that, there being in effect an agreement to pay on certificate, interest at 4*l.* per cent. on the sum certified ran from the date of the referee's report on June 1, 1911.

MOTION.

The plaintiff company in the action were the lessees in possession of certain land, mines, and premises at Ashover, in the county of Derby, known as the Fallhill estate, for a term of twenty-one years from May 1, 1907. The plaintiff John Bassett Gregory was the owner in fee simple of the Fallhill estate subject to the lease. The defendants were the executrix and executor and trustees of the will of John Jackson, and were the owners of land immediately adjoining the Fallhill estate.

Prior to the issue of the writ on June 17, 1910, the defendants, by their agents and workmen, had inadvertently but negligently trespassed on the plaintiffs' land and therefrom removed certain minerals in the form of spar. By the writ the plaintiffs claimed an injunction to restrain further trespass; a mandatory order to close ways, passages, and apertures; an account of all spar and other minerals and materials worked or

EVE J.
1911
ASHOVER FLUOR SPAR MINES, LIMITED v. JACKSON.

gotten or rendered unworkable under the plaintiffs' lands by the defendants, or their agents, and of the value of such spar and other minerals and materials, without making any allowance for the cost of working or getting the same; payment of the amount found on taking the said account; damages; and costs. On motion for an interlocutory injunction, treated as the trial of the action, it was on July 18, 1910, by consent, ordered (inter alia) that the action be compromised upon the following terms, namely, "That it be referred to a special referee to ascertain the sum to be paid as damages on the following basis. The referee is to inquire (1.) what was the market value, when brought to bank, of all spar gotten by defendants from the plaintiffs' land, making to the defendants all just allowances for the cost and expenses incurred by them in bringing such spar to bank, but not including the cost of severing or getting such spar. (2.) Whether the plaintiffs have suffered any and, if any, what damages by reason of the defendants having rendered spar or other minerals of the plaintiffs unworkable, or only workable at increased cost, or otherwise by reason of the defendants having trespassed in the plaintiffs' land. The defendants are to pay the amount to be found in answer to inquiry 1, and the amount, if any, to be found in answer to inquiry 2."

By an order made on November 7, 1910, the judge nominated Mr. Edward Pollock, one of the official referees, as special referee to ascertain the sum to be paid as damages upon the basis mentioned in the order of July 18, 1910; and on June 1, 1911, he reported the amount found by him on such basis to be payable as damages by the defendants to the plaintiffs to be 1515*l.*

The plaintiffs now moved that the referee's report be adopted and the defendants be ordered to pay 1515*l.* with interest at 4 per cent. from July 18, 1910.

J. H. M. Ryan, for the motion. The plaintiffs are entitled to interest at 4 per cent. on the damages found from the date when judgment was pronounced, in accordance with the Judgments Act, 1838, ss. 17, 18. By s. 17 every judgment debt is to carry interest at 4*l.* per cent. from the time of entering up the judgment. None of the forms of order in Appendix F of the

Rules of the Supreme Court were in fact followed, but Form 7A is of general application and applies: Annual Practice, 1911, vol. ii. p. 95.

Edward Beaumont, for the defendants. Interest on these damages is only payable from the date of the order to be made upon this motion, or at earliest from June 1, 1911, when the certificate of the referee was made. The practice in the Admiralty Court appears from the case of *The Kong Magnus* (1), where interest on damages was held to be payable from the date of a collision. That in the Common Law Courts is stated in *Borthwick* v. *Elderslie Steamship Co.* (2) That in the Chancery Courts is to be found in the cases of *Great Western Ry. Co.* v. *Fisher* (3) and *Phillips* v. *Homfray* (4), where interest on damages was not allowed. By the consent order in the present case the defendants were to pay the amount found in answer to the inquiry, and until that amount was found there was no enforceable order.

With regard to the Judgments Act, 1838, this case is outside that Act, as the order of July 18, 1910, was not an order whereby any sum of money was payable to the plaintiffs within s. 18 of the Act. A further order was necessary. In the present case there was an agreement embodied in an order, and it is not according to the forms in Appendix F. As to the observations made in the Court of Appeal in *Borthwick* v. *Elderslie Steamship Co.* (2), which may be relied on by the plaintiffs, they had reference to the particular judgment there referred to, and are inapplicable to the present case, where the order was in a different form.

J. H. M. Ryan in reply. The plaintiffs have been kept out of the money found due to them for a year, and it would be inequitable if no interest was payable on the damages. The case of *Phillips* v. *Homfray* (4) was one of equitable waste. There had been also a delay of twenty years in that case before interest was claimed.

The case of *Borthwick* v. *Elderslie Steamship Co.* (2) is

(1) [1891] P. 223.
(2) [1905] 2 K. B. 516.
(3) [1905] 1 Ch. 316, 325.
(4) (1890) 44 Ch. D. 694; [1892] 1 Ch. 465.

EVE J.
1911
ASHOVER FLUOR SPAR MINES, LIMITED v. JACKSON.

conclusive in my favour. That case shews that, where the judgment is for a sum which is subsequently ascertained, interest is payable upon that sum from the date of the judgment. Romer L.J. there said that the amount of damages must be treated as if mentioned in the judgment. So in the present case the damages must be treated as put into the judgment. In the case of *Dreyfus* v. *Peruvian Guano Co.* (1) there was no order to pay what was found due as damages.

Cur. adv. vult.

July 7. EVE J., after stating the facts, continued:—The plaintiffs' motion is that the report of the referee may be adopted, and the defendants ordered to pay to the plaintiffs the sum of 1515*l.* with interest thereon at the rate of 4 per cent. per annum from July 18, 1910. The defendants resist this claim to interest and contend that they ought not to be charged with any interest prior to the order to be made on this motion, and, alternatively, prior to June 1, 1911, when the referee made his certificate. The plaintiffs rely, first, upon the statute 1 & 2 Vict. c. 110, whereby it is provided (s. 17) that every judgment debt shall carry interest at the rate of 4 per cent. per annum from the time of entering up the judgment, and (s. 18) that all orders of Courts of Equity whereby any sum of money shall be payable to any person shall have the effect of judgments in the superior Courts of common law, and the persons to whom any such moneys shall be payable shall be deemed judgment creditors within the meaning of that Act; secondly, they rely upon the rule that, where any judgment is pronounced, the entry of the judgment shall be dated as of the day such judgment is pronounced, and the practice thereunder in cases where the judgment is for an amount to be ascertained subsequent to the judgment, as illustrated by Form No. 7A in Appendix F to the Rules of the Supreme Court, 1883 (see p. 95 of the Annual Practice, 1911, vol. ii.); and, thirdly, upon what was said in the Court of Appeal in the case of *Borthwick* v. *Elderslie Steamship Co.* (2) The defendants on the other hand contend that the order of July 18, 1910, is not an order whereby any sum of money is payable to the plaintiffs within

(1) (1889) 42 Ch. D. 66; 43 Ch. D. 316. (2) [1905] 2 K. B. 516.

s. 18 of the Judgments Act, 1838, that the practice relied upon is in no way applicable to such an order as this one, and that the observations made in the Court of Appeal must be read by the light of the judgment to which they had reference and have no bearing upon the point with which I have to deal.

I think this last criticism is entirely well founded. The order with which the Court of Appeal had to deal was an order of that Court whereby it was ordered that the judgment of the Court below dismissing the action should be wholly set aside, and that in lieu thereof judgment should be entered in the action for the plaintiff against the defendants on all issues for such sum as should be assessed by a referee, and it was conceded by counsel on behalf of the defendants, and affirmed in terms by Romer L.J., that the amount ultimately ascertained was to be treated as if it had been mentioned in the order, with the result that interest thereon ran from the date of the judgment. The order was in fact a judgment for the sum subsequently ascertained, and on the sum being ascertained and a note of the amount being indorsed upon the judgment, execution would issue.

But would any such result follow on the order made in this case on July 18, 1910, and the filing of the certificate thereunder? It belongs to a class of order with which we are all familiar, and stands somewhere between the two alternative forms in which such orders are usually made. In the first of the two alternative forms the inquiry is directed, and liberty to apply, after the result has been certified, is given. In the second alternative the Court, after directing the inquiry, goes on to order the defendant to pay to the plaintiff the amount certified. The latter of these orders is, in my opinion, within, and the former outside, the provisions of s. 18 of the Judgments Act, 1838. An order which is so framed as to necessitate a further order being made before the obligation to pay arises cannot reasonably be regarded as "an order whereby a sum of money" is payable, and in cases where the form adopted is that which gives the plaintiff liberty to apply, and nothing more, I do not see how any interest can run on the amount certified until the further order to pay has been made.

In the present case neither of the forms to which I have referred

EVE J.
1911
ASHOVER FLUOR SPAR MINES, LIMITED v. JACKSON.

has been adopted, but the parties have entered into an agreement which is embodied in the order, and includes a term whereby the defendants agree to pay the damages certified. Does this make the order one whereby a sum of money is payable by the defendants to the plaintiffs? I do not think it does, for the defendants' agreement can only be enforced by some further order in this, or possibly in some independent, action. The order is in truth an agreement, and unless it is so framed as either in express terms or by necessary implication to impose on the defendants the liability to pay interest from July 18, 1910, the plaintiffs cannot recover it. There is no express agreement to pay interest, and the agreement by the defendants to pay the amount certified does not, as I have held, bring the order within the statute, and unless it does, no implication arises that interest was to be paid from the date of the order.

I cannot, therefore, give interest from the date asked by the plaintiffs, but at the same time the defendants' agreement to pay cannot be wholly ignored, and I think I must treat it as an agreement to pay on certificate, and hold that as from that date, June 1, 1911, interest runs on the sum certified. There will, therefore, be an order on the defendants to pay the 1515*l.* with interest at 4 per cent. from June 1, 1911, and they must also pay the costs of the motion.

Solicitors: *Woodcock Ryland & Parker, for Alfred Grundy, Son & Co., Manchester; W. W. Wynne & Sons, for Shipton, Hallewell & Co., Chesterfield.*

G. M.

In re THOMAS DE LA RUE & CO., LIMITED AND REDUCED.

EVE J.
1911
July 18.

[1911 T. 027].

Company—Reduction of Share Capital — Scheme — Confirmation—Dissentient Shareholder—Costs—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 46.

A scheme for the reduction of the share capital of a company comes within s. 46 of the Companies (Consolidation) Act, 1908, although it differentiates between the holders of the same class of shares to the extent of paying off some and not others, and imposes upon the shareholders whose shares are to be extinguished the obligation to accept debenture stock in lieu of cash, and also involves the advance to the company of the moneys to be utilized in redemption of the share capital by the very persons whose shares are to be redeemed.

In re Nixon's Navigation Co. [1897] 1 Ch. 872, followed.

In confirming the scheme as on the whole fair and equitable the Court made it a term of its confirmation that the costs of a dissentient shareholder, who had assisted the Court by his criticism of the scheme, should be provided by the petitioning company.

PETITION.

This was a petition by Thomas de la Rue & Co., Limited and Reduced, to obtain the confirmation by the Court of a scheme for the reduction of the share capital of the company contained in special resolutions. The company was incorporated in 1908 with a capital of 1,200,000*l.* divided into 30,000 "A" 5 per cent. cumulative preference shares of 10*l.* each, 40,000 "B" 5 per cent. cumulative preference shares of 10*l.* each, and 50,000 ordinary shares of 10*l.* each. There was also a reserved fund of undivided profits amounting to 266,769*l.* The company had power under its articles, by special resolution, to reduce its capital.

By a special resolution of the company duly passed and confirmed in accordance with the provisions of the Companies (Consolidation) Act, 1908, at extraordinary general meetings of the company duly convened and held on December 14, 1910, and December 30, 1910, it was resolved as follows:—

"That the capital of the company be reduced to 640,000*l.*

EVE J.
1911
THOMAS DE LA RUE & CO., LIMITED AND REDUCED, *In re.*

divided into 14,000 B preference shares of 10*l.* each, and 50,000 ordinary shares of 10*l.* each, and that such reduction be effected by paying off the whole of the capital paid up on the 30,000 A preference shares in the company's capital of 10*l.* each and applying the assets representing the reserve fund towards payment off of the amount, and any deficiency to be provided by obtaining an advance from Sir Thomas Andros de la Rue, Baronet, by way of loan without security on the footing that the same shall carry interest at the rate of 4½ per cent. per annum, and by cancelling such shares, and by paying off or satisfying 26,000 of the B preference shares in the capital of the company of 10*l.* each, being the whole of the B preference shares except the 14,000 held by the said Sir Thomas Andros de la Rue, Baronet, and by issuing to the holders thereof perpetual debenture stock of the company, carrying interest at the rate of 4½ per cent. per annum, secured by a trust deed constituting a first mortgage upon the freehold and leasehold property of the company situate in Bunhill Row, in the county of London, and a floating charge on the undertaking of the company exclusive of the assets to be applied in payment off of the said A preference shares, and framed in accordance with the draft which has already been prepared by the solicitors of the company, and by cancelling the said 26,000 B preference shares."

At the said extraordinary meeting of the company held on December 14, 1910, it was resolved that sanction and authority be given to the directors to make an issue of 260,000*l.* perpetual debenture stock of the company.

It appeared from the petition that for many years prior to December 31, 1910, the company held a valuable contract for the manufacture and supply of stamps to His Majesty's Government. Such contract determined on December 31, 1910, and had not been renewed, and the field for the employment of the company's capital had by reason of such determination been accordingly restricted.

There was one dissenting shareholder to the scheme who held certain "B" preference shares in his own capacity and also as one of the trustees of a will.

P. O. Lawrence, K.C., and *T. J. C. Tomlin*, for the petitioners. The scheme is one which the Court has jurisdiction to sanction, being within the wide words of s. 46 of the Companies (Consolidation) Act, 1908. (1)

The circumstances of the present case are somewhat similar to those in *In re Nixon's Navigation Co.* (2), where a portion of the capital returned to the shareholders under a scheme for reduction was to be immediately borrowed from them on debentures. The shareholders here get what is equivalent to assets, and money or money's worth is given in exchange for the preference shares which are cancelled. The debenture stock affords an ample security. The scheme is in accordance with Palmer's Company Precedents, 10th ed. pt. i. p. 1198, and the decided cases.

In *British and American Trustee and Finance Corporation* v. *Couper* (3) there was a return of assets and some inequality among the shareholders, but nothing inequitable, according to Lord Macnaghten. So in *Poole* v. *National Bank of China* (4) it was held that there was no injustice done to the shareholders whose shares were cancelled. Here the scheme as a whole is a fair commercial bargain as between business men, and the mere personal feeling of the shareholders need not be considered. No injustice is done to the dissentient shareholder. The scheme, therefore, being both legal and fair, should be confirmed by the Court.

Sheldon, for the dissentient shareholder. The scheme is not within the jurisdiction of the Court under s. 46 of the Act, and the Court will not in its discretion sanction anything which is unfair or inequitable to any of the shareholders. The shareholder is entitled to be paid in cash and cannot be compelled to accept part of the assets in a scheme for reduction of capital. If this had been a land company, the shareholder could not have been compelled to accept portions of the land of the company.

(1) Sect. 46: "Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way."

(2) [1897] 1 Ch. 872.

(3) [1894] A. C. 399.

(4) [1907] A. C. 229.

EVE J.
1911
THOMAS DE LA RUE & CO., LIMITED AND REDUCED, *In re*.

This scheme, even if within the jurisdiction of the Court under s. 46, is inequitable and unfair to the dissentient shareholder. His interest is reduced from 5 per cent. to 4½, and there is no additional security.

EVE J. This petition has given rise to an interesting discussion. The company thereby seek the confirmation by the Court of a scheme for the reduction of their share capital. The capital is large—1,200,000*l.* divided into 10*l.* shares, whereof 30,000 are "A" 5 per cent. cumulative preference shares, 40,000 are "B" 5 per cent. cumulative preference shares, and 50,000 are ordinary shares. The company desire to reduce the capital by the sum of 560,000*l.*, and they propose to bring that reduction about by paying off the whole of the 30,000 "A" shares and 26,000 out of the 40,000 "B" shares. They have not sufficient moneys in hand wherewith to provide for these payments in full, but they have an accumulated reserve of undistributed profits amounting to 266,000*l.* and upwards, and they propose to apply this, and a sum of between 33,000*l.* and 34,000*l.* which the individuals mainly interested in the company's welfare are prepared to advance to the company by way of loan without security, in paying off the 300,000*l.* representing the capital paid up on the "A" preference shares. They further propose to raise the money required for paying off the 260,000*l.* represented by the 26,000 "B" preference shares by the issue of perpetual debenture stock charged upon the assets of the company and carrying interest at the rate of 4½ per cent. per annum; but they do not contemplate raising this money from any outside quarter, but from those who under the scheme will be entitled to receive it on payment off of their shares. In other words, the scheme imposes upon each holder of the 26,000 "B" shares the obligation to accept in exchange for and in satisfaction of his holding as a shareholder an aliquot proportion of the debenture stock equivalent in nominal amount to the amount paid up on his "B" shares. Such is the scheme of reduction, and the first question which arises is whether such a scheme comes within s. 46 of the Companies (Consolidation) Act of 1908; if it does not, it is a scheme which the Court has no jurisdiction to confirm.

The section is in very wide terms. It enacts that, "subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way," and then goes on to deal with some particular modes of reducing capital; but it is obvious from the wording of the section itself and from what has been laid down by the House of Lords in the two cases which deal with this matter very fully, namely, *Couper's Case* (1) and *Poole* v. *National Bank of China* (2), that full effect is to be given to the earlier part of the section without reference to the particular modes indicated in the latter part, and that this latter part is not to be treated in any way as limiting or controlling the wide power conferred by the earlier part.

It cannot be denied that the scheme under consideration is one for reducing the share capital of the company, but it involves in the case of the "B" shareholders the payment off of some only of the shares—26,000 out of 40,000—and further it imposes on those of the shareholders whose shares are to be extinguished the obligation to accept debenture stock in lieu of cash. Do these elements put the scheme outside s. 46? Guided by the authorities to which I have just referred and by the case of *In re Nixon's Navigation Co.* (3), I do not think they do. It is thereby established that in a scheme for the reduction of share capital a company may differentiate between the holders of the same class of shares at least to the extent of paying off some and not paying off others, and that it is open to a company desiring to reduce its share capital to borrow a sufficient fund to pay off the capital represented by the shares by which the capital is to be reduced. It is true that the scheme here proposed involves something further—the advance to the company of the moneys to be utilized in redemption of the share capital by the very persons whose shares are to be redeemed—but this addition does not, in my opinion, put the scheme outside the section. It is an element to be taken into consideration by the Court in exercising the discretion with which it is charged; its presence does not operate to make the scheme other than a scheme for

(1) [1894] A. C. 399. (2) [1907] A. C. 229.
(3) [1897] 1 Ch. 872.

EVE J.
1911
THOMAS DE LA RUE & CO., LIMITED AND REDUCED, *In re.*

the reduction of the share capital. I think the scheme comes within s. 46 and is one, therefore, which the Court has jurisdiction to confirm.

This brings me to the second point raised by those who oppose the confirmation of this scheme of reduction. They assert that it is inequitable and unfair. The assertion is not put upon the ground that the resolution contemplates the extinguishment of a part only of the capital represented by the "B" shares, but upon the ground that the "B" shareholder, whose shares are to be extinguished, is to receive in exchange something which he may not want to accept, bearing a reduced rate of interest and without any corresponding advantage or addition in the way of security. In considering these objections regard must be had to the scheme as a whole. The mere fact that the "B" shareholder is not to be paid his money, but is to receive something to represent that money, does not in itself make the scheme inequitable or unfair. Many schemes have already been confirmed which involved satisfaction by an allocation of assets of the company and not by payment in cash. There must be something more than a mere substitution of meal for malt before the Court will refuse to confirm a scheme on the ground of its being unfair. The Court must be satisfied that the proposal is in fact unfair. It is, after all, a question of degree. If that which the company is offering to the shareholder is so illusory as to be no adequate consideration for the capital represented by his share, no Court will confirm the proposal; but if the question comes to this, whether as a matter of business that which is offered in exchange for the share is a fair and reasonable exchange, then in ninety-nine cases out of a hundred I am quite satisfied it is the duty of the Court as far as possible to leave those who are participating in the exchange to decide as to the adequacy or inadequacy of the consideration which they are offered, and although, as I ventured to point out in the course of the argument, there may be cases where individual shareholders having other interests to serve might subordinate their views with regard to the particular exchange to those other interests, I have not heard any suggestion of that sort in this case, and, so far as I can see, the position of the dissentient shareholder here is not at all dissimilar to or

different from the position of every other shareholder who is to be redeemed on the same terms.

In that position of affairs I have this, that out of the holders of the 26,000 shares which are to be redeemed the holders of over 24,000 shares are satisfied with the arrangements made and are content to accept that which is offered them by the company in exchange for their shares as adequate compensation and consideration. The dissenting shareholder regards the reduction in the rate of interest as not being compensated for by the additional security afforded by the debenture stock, and therefore he dissents. That he is entitled to do, but, in determining whether the scheme is so inequitable as to compel me at his invitation to withhold my confirmation of it, I am bound —all other things being equal—to pay regard to the fact that the view which he takes is the view of a very small minority. Looking at the scheme as a whole, bearing in mind the probable effect on the company's prospects of the determination of the important contracts referred to in the evidence, and satisfied as I am that those who support the scheme do so in the honest belief that it is for the advantage of themselves and the company, I am constrained to come to the conclusion that the view adopted by Mr. Sheldon's client is a mistaken one and not justified by the true state of circumstances. I therefore propose to confirm the reduction; but it is competent for the Court to give its confirmation on such terms and conditions as it may think fit, and in this particular case the company have themselves suggested a term which they invite the Court to impose. I think it is a very reasonable and proper term, and I propose, therefore, to confirm the reduction on the condition that the debenture stock which is to be issued to the "B" shareholders is to be made repayable at the expiration of forty years from the date of issue, and is not to be what is called "perpetual debenture stock."

As I do not wish to discourage shareholders affected by schemes of this kind from appearing at the hearing of the petition to obtain the Court's confirmation and pointing out matters to which the attention of the Court may properly be drawn, and as I have been materially assisted in this case by the

EVE J.
1911
THOMAS DE LA RUE & CO., LIMITED AND REDUCED, *In re.*

criticism of this particular dissentient, I propose to make it a further term of my confirmation that his costs are provided for by the company.

Solicitors: *Bristows, Cooke & Carpmael; Kearsey, Hawes & Wilkinson.*

G. M.

WARRINGTON J.
1911
July 21.

TAYLOR, PLINSTON BROTHERS & CO., LIMITED *v.* PLINSTON.

[1911 T. 967.]

Practice—Attachment—Motion to Commit—Necessity for Service of Copy of Affidavit with Notice of Motion—Distinction between Attachment and Committal—Rules of Supreme Court, 1883, *Order* LII., *r.* 4.

By Order LII., r. 4, "Every notice of motion . . . . for attachment . . . . shall state in general terms the grounds of the application; and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion":—

Held, that the rule applied as well to motions to commit as to motions for leave to issue a writ of attachment, and therefore that on a motion to commit for breach of an order of the Court a copy of the affidavit on which the motion is founded must be served with the notice of motion.

Dictum of Chitty J. in *Harvey* v. *Harvey* (1884) 26 Ch. D. 644, 654, followed.

Litchfield v. *Jones* (1883) 25 Ch. D. 64, considered. (1)

MOTION.

By an order dated July 14, 1911, an interim injunction extending over Friday, July 21, was granted restraining the defendant, his servants and agents, from taking or retaining possession of or interfering with or making use of an amusement, machine, or device called "The Cake Walk" belonging to the plaintiff company and then on the foreshore at Southport in the county of Lancaster.

The plaintiff company alleged that the defendant had committed a breach of this injunction and now moved for an order that a writ of attachment might issue against the defendant for breach by him of the order, or, in the alternative, that the

(1) Reversed on appeal, Saturday, October 21. The appeal will be reported in due course.

defendant might be committed for contempt of Court in disobeying the order.

The notice of motion was served on the defendant, but no copy of affidavit on which the motion was founded was served with it.

J. G. Wood, for the plaintiff company.

J. Rolt, for the defendant. I take the preliminary objection that no copy of the affidavit on which the motion is founded was served with the notice of motion. The plaintiff company has not, therefore, complied with the requirement of r. 4 of Order LII. of the Rules of the Supreme Court, 1883: *Litchfield* v. *Jones*. (1) The motion is therefore irregular and ought to be dismissed.

J. G. Wood. Rule 4 of Order LII. applies only to attachment and not to committal. The report of *Litchfield* v. *Jones* (1) in the *Law Reports* is inaccurate in stating that the motion there was to commit. It was in fact a motion for attachment, as appears from the fuller report of the case in the *Weekly Reporter*. (2) The distinction there sought to be drawn by counsel for the applicant was between a motion for attachment for disobedience to an order for discovery of documents and a writ of attachment under the old common law practice. [He also referred to Mr. Registrar Lavie's memorandum as to committal and attachment set out in a note to the report of *In re Evans* (3) and to *D.* v. *A. & Co.* (4)]

[WARRINGTON J. What troubles me is the general impression that there is now no difference between attachment and committal. In *Harvey* v. *Harvey* (5) Chitty J. seems to have thought that the distinction between attachment for contempt and committal for contempt had been practically abolished.]

J. Rolt in reply. The practice has been to treat committal and attachment as one and the same thing for the purposes of r. 4 of Order LII. on the authority of *Litchfield* v. *Jones* (1): see Oswald on Contempt, 3rd ed. p. 205; Annual Practice, 1911,

(1) 25 Ch. D. 64.
(2) 32 W. R. 288.
(3) [1893] 1 Ch. 252, 259.
(4) [1900] 1 Ch. 484.
(5) 26 Ch. D. 644, 654.

WARRINGTON J.
1911
TAYLOR, PLINSTON BROTHERS & CO., LIMITED v. PLINSTON.

vol. i. p. 825; Seton on Judgments, 6th ed. p. 444. The object of the rule is that a person whom it is sought to attach should know not only why the application is made, but the evidence on which it is made. That was the view taken by Kekewich J. in *Taylor* v. *Roe*. (1) The general opinion of the profession since the decision of Chitty J. in *Harvey* v. *Harvey* (2) has been that the rule applies both to attachment and committal, and the practice has been in accordance with that opinion.

[He was stopped.]

WARRINGTON J. This case raises a point of practice on which there appears to be no direct authority, and one which it is curious should now arise for decision so many years after the Rules under the Judicature Acts have been in force. The point is this: Is it necessary to serve with a notice of motion to commit for breach of an injunction a copy of the affidavit intended to be used in support of the motion? Order LII., r. 4, provides that "Every notice of motion to set aside, remit, or enforce an award, or for attachment, or to strike off the rolls, shall state in general terms the grounds of the application; and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion." In the present case an order was made restraining the defendant by injunction from doing certain particular things. He is said to have disobeyed that order and has been served with a notice of motion which asks in the first place for an order that a writ of attachment shall issue against him for breach of the order, or, in the alternative, that he shall be committed for contempt of Court in disobeying the order. The notice of motion was served on the defendant, but no copy of the affidavit intended to be used was served with it. If, therefore, the present case comes within r. 4 of Order LII., that rule has not been complied with.

In the first place I may say that I am clearly of opinion that the general impression of the profession is that there is now no difference in this respect between a motion for leave to issue a writ of attachment and a motion to commit. I have spoken to

(1) (1893) 68 L. T. 213.

(2) 26 Ch. D. 644.

the learned and experienced registrar in attendance on this Court, and he informs me that it is the universal practice in the registrars' office to require a copy of the affidavit in support to be served with the notice of motion to commit, and that he would stop any order if he found out that this had not been done.

I must now refer to the authorities in order to see what has been said on the point. There is no real authority either way. The Annual Practice, 1911, vol. i. p. 825, contains this note to Order LII., r. 4: "This rule applies to a motion to commit for disobedience to an order for discovery under Order XXXI., r. 21"; and Seton on Judgments, 6th ed. p. 444, contains a note in the same terms, and for both of these notes the authority cited is *Litchfield* v. *Jones*. (1) In that case the order which was not complied with was an order for discovery of documents, and the proper remedy was undoubtedly an order for attachment and not for committal. In the report in the *Law Reports* (1) the notice of motion is called one for committal, but in the fuller report in the *Weekly Reporter* (2) the notice of motion is called one for leave to issue a writ of attachment. But in any case the proper remedy there was attachment. Looking at North J.'s judgment, I think that the real point with which the learned judge was dealing was not the difference between attachment and committal, but a suggested difference between attachment for non-compliance with an order for discovery and other kinds of attachment, and he held that there was no difference between them. I think, therefore, that *Litchfield* v. *Jones* (1) is not an authority on the present point.

There is no other authority on the point, because the learned and careful memorandum of Mr. Registrar Lavie which is set out in a note to the report of *In re Evans* (3) does not directly deal with this point. The question there was as to the necessity of personal service of the notice of motion, and the memorandum points out the distinction between attachment and committal and the necessity for personal service of the notice of motion. All that is said on the point is (4): "In every case the notice of motion, whether personally served or not,

(1) 25 Ch. D. 64.
(2) 32 W. R. 288.
(3) [1893] 1 Ch. 259.
(4) Ibid. 263.

WARRINGTON J.
1911
TAYLOR, PLINSTON BROTHERS & CO., LIMITED v. PLINSTON.

must state in general terms the ground of the application, and the affidavits intended to be used on the hearing must be served together with the notice of motion," and reference is then made to Order LII., r. 4. If the memorandum be read strictly the words "in every case" must refer to a notice of motion for leave to issue a writ of attachment, whether personally served or not, and not to a notice of motion to commit. The result, therefore, is that the memorandum is no direct authority on the point.

I come now to consider whether there is any real ground on the Rules for the distinction alleged to exist by the plaintiff company between attachment and committal in regard to service of a copy of the affidavit. In *Harvey* v. *Harvey* (1), although the actual decision was not in point, Chitty J. (2) does deal with the supposed distinction between attachment and committal. He says: "By Order XLII., rules 7 and 24, already cited, attachment and committal are apparently placed on the same footing, and in a case of *Sprunt* v. *Pugh* (3), on a motion against a receiver, in which I myself was counsel, the late Master of the Rolls (Sir G. Jessel) stated his opinion, though it does not appear in the report, that the distinction between committal for contempt and attachment for contempt was practically abolished; the difference between them seems mainly to be in the more summary process of the former and in the degree of inconvenience and expense attending it." I think I may act on that statement of Chitty J., because in my judgment he there expresses what I understand to have been the general opinion of the profession since that decision.

Then do the Rules really create any difficulty on the point? Rule 7 of Order XLII. refers to the means of enforcing an order and provides that "A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal." In Order LII., r. 4, no mention is made of committal. If that rule were to be construed very strictly it might be contended that, inasmuch as Order XLII., r. 7, refers to both attachment and committal, and Order LII., r. 4, refers only to

(1) 26 Ch. D. 644. (2) 26 Ch. D. 654.
(3) (1878) 7 Ch. D. 567.

"attachment," "committal" was intentionally omitted from the latter rule, and that the rule refers only to one mode of enforcing an order. But I do not think that r. 4 will bear that interpretation. Rule 4 is not accurately worded, for it refers to a "notice of motion for attachment," and there is no such thing. What it ought to have referred to is a "notice of motion for leave to issue a writ of attachment." I think the probable explanation of that is that what the framers of the rule had in contemplation was not the particular method of attachment, but the fact itself of the attachment of the person, and that from that point of view it was immaterial whether the party in question was taken into custody by the tipstaff or whether he was apprehended under a writ of attachment.

In my judgment, therefore, Order LII., r. 4, applies to every motion under which the person of the subject may be attached and taken into custody. I therefore hold, in accordance with the general opinion of the profession, at all events since Chitty J.'s judgment in *Harvey* v. *Harvey* (1), that there is now no distinction between attachment for contempt and committal for contempt, and that it would be wrong even on the Rules to draw any such distinction. I think that the note in the Annual Practice, 1911, to Order LII., r. 4, ought to be expressed in wider terms than it is at present, and that the rule applies as well to motions to commit as to motions for leave to issue a writ of attachment. Mr. Rolt's preliminary objection therefore succeeds. I accordingly dismiss the motion with costs.

Solicitors: *W. Drake; Meredith, Mills & Clark, for H. T. Smith, Southport.*

(1) 26 Ch. D. 644.

W. I. C.

WARRINGTON J.

1911

July 25.

In re SIR WALTER SCOTT.

SCOTT *v.* SCOTT.

[1911 S. 790.]

Will—Real Estate—Limitations in strict Settlement—Legal Uses—Limitations to A. for Life, Remainder to his Sons in Tail Male, Remainder to B. for Life—Disclaimer by A. of Life Estate—No present Issue of A.—Acceleration of B.'s Life Estate—Contingent Remainders Act, 1877 (40 & 41 *Vict. c.* 33).

Testator, by his will, devised certain freehold estates to the use of his eldest son, J., for life, with remainder to the use of his first and other sons successively in tail male, with remainder to his grandson W., the son of his second son J. S., for life, with remainders over. Then, after giving numerous legacies and annuities, the testator devised and bequeathed his real and personal estate not otherwise specifically disposed of to trustees upon trust to sell and convert, and to stand possessed of the proceeds upon the trusts therein mentioned.

J., the testator's eldest son, had disclaimed the estate for life limited to him by the will. He was married and his wife was living, but he had no issue and there was no prospect of any:—

Held, that the estate for life in remainder of W. was not accelerated by J.'s disclaimer, but that the rents and profits of the disclaimed estate during the life of J., so long as he had no son, formed part of the testator's residuary estate and were distributable as income of that estate.

Carrick v. *Errington* (1726) 2 P. Wms. 361, affirmed by the House of Lords sub nom. *Errington* v. *Carrick* (1728) 5 Bro. P. C. 391, discussed and applied.

Adjourned Summons.

Sir Walter Scott, Bart., by his will dated June 26, 1908, after appointing executors and trustees thereof, devised certain freehold estates in the counties of Northumberland and Cumberland and the city of Carlisle to the use of his eldest son, John Scott, for his life, with remainder to the use of his first and other sons successively, according to seniority, in tail male, with remainder to the use of his grandson Walter Scott, the son of his second son, Joseph Samuel Scott, for life, with remainders over. Then, after giving numerous legacies and annuities, the testator devised and bequeathed his real and personal estate not otherwise specifically disposed of to his trustees upon trust to sell and

convert, and to stand possessed of the proceeds upon the trusts therein mentioned.

The testator died on April 8, 1910.

John Scott, the testator's eldest son, had absolutely disclaimed the life estate limited to him by the will and had refused to adopt the title. He had been married for many years and his wife was still living, but there was no issue of the marriage and no prospect of any.

Walter Scott, the tenant for life in remainder, was an infant.

This was an originating summons taken out by the trustees of the will against John Scott, Walter Scott, and certain persons interested in the residuary estate for the determination (inter alia) of the question whether, having regard to the fact that John Scott had disclaimed the estate for life devised by the will, the rents and profits of such estate during his life, or during some other and what period, (*a*) formed part of the residuary estate of the testator and were distributable in accordance with the provisions as to the income of the residuary estate contained in the will; or (*b*) were payable to the person who would for the time being be entitled thereto under the limitations of the real estate contained in the will if John Scott were dead; or (*c*) whether there was an intestacy as to the rents and profits during such period as aforesaid, or how otherwise the rents and profits ought to be dealt with.

The summons was served on John Scott, but he had not entered an appearance and was not represented at the hearing.

H. E. Wright, for the trustees.

W. E. Vernon, for Walter Scott. The effect of the disclaimer by John Scott of his life estate is, in the events which have happened, to accelerate the life estate in remainder of Walter Scott. The estate of the latter is a vested estate and now comes into possession, but is subject to defeasance on the birth of a son of John Scott: Sheppard's Touchstone, 7th ed. pp. 435, 452. The ground of the decisions in *In re Townsend's Estate* (1), *In re Johnson* (2), and *In re Vernon* (3), which appear to be against me,

(1) (1886) 34 Ch. D. 357. (2) (1893) 68 L. T. 20.
(3) (1906) 95 L. T. 48.

WARRINGTON J.
1911
SCOTT, *In re.* SCOTT *v.* SCOTT.

was that the persons entitled in default of issue could not be immediately ascertained. *D'Eyncourt* v. *Gregory* (1) is a decision in my favour.

In *Carrick* v. *Errington* (2), affirmed by the House of Lords sub nom. *Errington* v. *Carrick* (3), there was an estate to trustees to preserve contingent remainders interposed immediately after the life estate which failed, and the decision so far as it is intelligible turned on that point. [He also referred to Jarman on Wills, 6th ed. vol. i. p. 718; 2nd ed. vol. i. p. 484; and *White* v. *Summers*. (4)]

[WARRINGTON J. referred to Fearne on Contingent Remainders, 10th ed. vol. i. p. 281, and the Contingent Remainders Act, 1877.]

McMullan, for persons interested under the residuary devise. The disclaimer does not operate to accelerate Walter Scott's life estate in remainder because of the interposed contingent remainder to the sons of John Scott. No authority has been cited against me. The actual decisions in *In re Townsend's Estate* (5) and *In re Johnson* (6) are in my favour, though the reasons given do not assist me. *D'Eyncourt* v. *Gregory* (1) turned on intention and the meaning of a shifting clause. The remarks in Jarman on Wills, 2nd ed. vol. i. p. 484, on *Carrick* v. *Errington* (2) support my contention. See also Fearne on Contingent Remainders, 10th ed. vol. i. p. 281. An estate cannot go and come back again without an express limitation for that purpose. If the estate once gets into Walter Scott it cannot get back into the issue of John Scott, the limitations of the latter being prior limitations. What is limited to Walter Scott by the will is an absolute life estate in remainder, and the Court will not read into that limitation a provision taking the estate back on the happening of a certain event. This is the true ground of the decision in *Carrick* v. *Errington*. (2) The trustees to preserve contingent remainders in that case were quite unnecessary, as the whole estate was vested in trustees and the limitations were equitable only. Accordingly, since the Contingent Remainders Act, 1877, that case is a good authority in the present case, though

(1) (1864) 34 Beav. 36.
(2) 2 P. Wms. 361.
(3) 5 Bro. P. C. 391.
(4) [1908] 2 Ch. 256, 271.
(5) 34 Ch. D. 357.
(6) 68 L. T. 20.

the limitations here are legal; see *Hopkins* v. *Hopkins* (1), where *Carrick* v. *Errington* (2) is explained.

[He was stopped.]

WARRINGTON J. This is a very curious case. The testator, Sir Walter Scott, by his will devised certain freehold hereditaments to the use of his eldest son, John Scott, for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of his grandson Walter Scott, the son of his second son, for life, with remainders over. John Scott, the testator's eldest son, has disclaimed the limitation to himself, and the question is, what is the result of that disclaimer? On the one hand it is contended on behalf of Walter Scott, the grandson, that the result of that is to accelerate his life estate. To that it is replied that his life estate cannot be accelerated because there is interposed between it and the life estate of John Scott an estate to the first and other sons of John Scott in tail male. John Scott at present has no sons, and the estate tail is not immediately capable of taking effect, and Walter Scott contends that he has become entitled immediately as tenant for life in remainder, with, of course, this condition, that if a son should hereafter be born to John Scott his estate in tail male will then take effect. The real question which I have to decide, I think, is whether it is possible, according to the principles regulating the limitations of real estate, so to mould the limitations of this will that the estate of Walter Scott shall take effect subject to its being hereafter determined by the birth of a son of John Scott. The determination of this question is not one of construction, but it depends entirely upon the legal effect, in the events which have happened, of the limitations in the testator's will.

There is no question that as a general rule the effect of a disclaimer or other destruction of the particular estate is to accelerate the estates in remainder, and that is why I say I think the real question I have to determine is whether the life estate of Walter Scott can be accelerated while there is still a possibility of some person becoming entitled under the limitation to the first and other sons of John Scott in tail male.

(1) (1738) 1 Atk. 581, 597. (2) 2 P. Wms. 361.

WARRINGTON J.
1911
SCOTT, *In re.* SCOTT v. SCOTT.

Under the old law as it existed before the passing of the Contingent Remainders Act, 1877, preventing contingent remainders from failing, there would, I think, have been no question what would have happened. The limitation to John Scott for life with remainder to his first and other sons in tail male with remainder to Walter Scott for life would have been limitations of this nature: an immediate limitation to John Scott for life, vested, of course, on the death of the testator, a contingent remainder to his first and other sons in tail male, contingent, that is, so long as there was no issue born, and a vested remainder to Walter Scott for life. As to that, I do not think there is any question, and the result would have been that, the contingent remainder to the first and other sons of John Scott in tail male being void by reason of the destruction of the particular estate in the lifetime of John Scott, the estate of Walter Scott for life would have taken effect immediately on the disclaimer of John Scott, but it would have so taken effect, not because the limitation to Walter Scott could operate as a temporary limitation which might be afterwards avoided by birth of issue of John, but because the limitation to the issue of John was itself void, and the life estate of Walter would have taken effect for good and all. Now, that result would have been prevented by the interposition of trustees to preserve contingent remainders, and if under the old law these limitations had been to the use of John for life with remainder to the use of trustees to preserve contingent remainders—that is, with remainder to the use of trustees during the life of John upon trust to preserve contingent remainders—with remainder to the use of Walter Scott for life, and then the life estate of John had ceased by reason of his disclaimer, I think it is equally plain that the estate which would have been accelerated would have been the estate to the trustees to preserve contingent remainders, and that the life estate to Walter would have taken effect after and not until the determination of that estate. That that would have been the law is shewn plainly by the report of *Carrick* v. *Errington*. (1) It is quite true that that report, in one sense, is not quite accurate, because, as a matter of fact, the legal estate in

(1) 2 P. Wms. 361.

the property was outstanding altogether in other trustees—that is, the limitations there were equitable; but I think the case is treated as if it had been the simple one which I have just put of a limitation to A. for life with remainder to trustees to preserve contingent remainders with remainder to the first and other sons of that tenant for life in tail with remainders over. It was there decided that, the life estate of the first tenant for life not being capable of taking effect for reasons which it is unnecessary to explain, the estate that was accelerated was the estate to trustees to preserve contingent remainders, and that the remainders over expectant on the contingent limitation to the first and other sons of the first tenant for life did not take effect while it was unascertained whether he would have a son or not. I think that is clearly the result of that case as appears from the report in Peere Williams (1), and perhaps still more from the passage cited by Lord Hardwicke in his judgment in *Hopkins* v. *Hopkins*. (2) What exactly the passage is which is set out in that judgment it is difficult to say. It is put in inverted commas, but it is not taken from the report in Peere Williams. Where it comes from I do not know, but I think it explains with great clearness what is the ground of the decision in *Carrick* v. *Errington*. (1) The passage is this: "Lord King, and afterwards the House of Lords, held, that the trust being not only to receive rents, &c., but also to preserve contingent remainders, and possibly a person capable of taking might come in esse, that *that* was a further trust, which the statute did not make void;"—that is the statute against Popish recusants in that case—"it had indeed avoided that for life, but as there was another trust upon the legal estate, which might, by possibility, be capable of being enjoyed, the estate should remain in the trustees, to support the contingent remainders; and as to the profits in the mean time (for the remainderman could not take them, nor the trustees, they being only mere instruments) the heir at law should have them, till some person came in esse, capable of taking under the contingent remainders." "This, therefore," remarks Lord Hardwicke, "is a very clear authority, that there may be *a resulting trust* (under a trust to

(1) 2 P. Wms. 361. (2) 1 Atk. 597.

WARRINGTON J.
1911
SCOTT, *In re.* SCOTT *v.* SCOTT.

support contingent remainders) for the heir at law, in the same manner as under an executory devise: Indeed it was insisted in that case, that the estate should, in the mean time, go over; but the Court held otherwise, for then it would have vested by purchase, and could never have come back again." I think, therefore, to take it by steps, if there had been introduced here trustees to preserve contingent remainders—in other words, if the contingent remainders had been protected from destruction in the way in which contingent remainders liable to be destroyed but for such protection were protected—the estate of Walter Scott would not have been accelerated. Now, since the Act of 1877 a contingent remainder, if it is otherwise valid, that is to say if it does not offend against the rules that apply to an executory limitation, amongst others the rule against perpetuities, and so forth, is not liable to destruction, but may take effect as an executory limitation. What then is the effect of that? It seems to me that the effect is to put the present limitation on the same footing as if there had been trustees to preserve contingent remainders. It is true that the limitation in remainder to the use of Walter Scott is a vested remainder, that is to say it is not contingent on the failure of issue, but nevertheless there is interposed an estate tail in the sons of John, and according to the old rules relating to limitations of real estate it seems to me impossible that there could be an estate in remainder which might afterwards come to an end so as to let in an estate previously limited. That is so stated in *Carrick* v. *Errington* (1), and I think the same result follows from the statement in Fearne on Contingent Remainders, 10th ed. vol. i. p. 281, with reference to the law as to the destruction of contingent remainders, namely, that "It is a general rule, that, wherever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it. This rule depends upon the necessity there is for the freehold to pass out of the grantor, at the time the remainder is created. If no freehold passes, how is the remainder-man to have it? If it passes at all, it must pass either in the particular estate, or in some remainder limited after it; in a contingent remainder it cannot pass,

(1) 2 P. Wms. 361.

because such remainder at the time of its creation passeth to or vests in nobody; and if it passeth only in some vested remainder limited after the contingent remainder, then is such contingent estate precluded from ever arising at all; for that freehold then becomes vested in possession, which the contingent estate was limited to precede; and of course there is no room left for the introduction of the contingent freehold. It follows, therefore, that some preceding vested estate of freehold must be limited, to give existence to such a contingent remainder." It seems to me, therefore, that if I am to hold that the life estate of Walter Scott takes effect, I must also hold that the estate tail to the possible issue of John is destroyed, for I cannot accelerate the gift in remainder without destroying the estate tail to the possible issue of John. It is admitted on all hands I cannot do that, and therefore I think the result of this is that, in consequence of the disclaimer of John and the interposition of the estates tail (subject of course to the question as to the effect of the residuary gift, with which I am not dealing for the moment), the estates during the life of John would pass to the testator's heir-at-law until the birth of a son to John, or until the death of John, at which time it would be ascertained whether there would or would not be issue inheriting under the devise in tail.

But having considered the will I think it is quite clear that in fact here there is no interest undisposed of so as to result to the heir, that is to say there is a sufficient and complete disposition in this will, and the only question is which of the several dispositions in the will takes effect. I think I must therefore hold that the interest in question is undisposed of so far as regards the devise in settlement by the will, but the residuary devise includes all property not otherwise specifically disposed of. As a result of what I have already said the interest in question passes under the residuary devise and bequest.

Solicitors for all parties: *Donald McMillan & Mott, for Stanton, Atkinson & Hudson, Newcastle-upon-Tyne.*

W. I. C.

WARRINGTON J.

1911

July 27.

In re Applicatons of POPE'S ELECTRIC LAMP COMPANY, LIMITED, FOR REGISTRATION OF A TRADE MARK.

Trade Mark—Registration—Special Application—Distinctive Word—User—Surname—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *par.* 5; *ss.* 9, 44.

Special applications by Pope's Electric Lamp Company, Limited, to register the word "Pope" as a trade mark for incandescent electric lamps were referred by the Board of Trade to the Court. The evidence established a prima facie case of the word having become identified by user with the goods of the applicant company:—

Held, that the word "Pope," being for all essential purposes the surname of the manufacturer of the applicant company's goods, was not in its nature adapted to distinguish them from the goods of other persons of the name of Pope, and could not become so adapted by user so as to be capable of registration as a trade mark under s. 9, par. 5, of the Trade Marks Act, 1905.

Held, also, that, even if the word could in its nature be adapted to distinguish, the Court ought not in the exercise of its discretion to make the order asked for.

Remarks of Fletcher Moulton L.J. in *In re Joseph Crosfield & Sons, Ld.*, [1910] 1 Ch. 130, 148, with reference to laudatory epithets applied.

Motion.

On November 8, 1910, Pope's Electric Lamp Company, Limited, made, under s. 9, par. 5, of the Trade Marks Act, 1905, special applications (No. 328,326 and No. 328,327) for registration of the surname "Pope" as a trade mark in classes 8 and 13 in respect of incandescent electric lamps included in those classes. The Board of Trade referred the matter to the Court. The applicant company accordingly gave notice of motion for a declaration that for the purpose of its applications to the Registrar of Trade Marks the mark applied for was to be deemed a distinctive one within s. 9, par. 5, of the Trade Marks Act, 1905, and for an order that the registrar should accept the applications and should proceed with the same.

The facts were as follows. Pope's Electric Lamp Company, Limited, carried on the business of incandescent electric lamp manufacturers. The present company was the successor of another company of the same or nearly the same name, and the business of the manufacture was commenced in the year 1904.

From that time or very shortly afterwards the company for the time being carrying on the business adopted the practice of putting the name "Pope" on its lamps, on the packages in which the lamps were enclosed, on its circulars, and on its advertisements, and used that name in connection with its lamps in many other ways as a trade mark. By this means, in the trade and with those who were familiar with the names of the various manufacturers of incandescent lamps, a lamp bearing the word "Pope" had come to mean a lamp manufactured by Pope's Electric Lamp Company, Limited. There was no evidence that amongst the public that name had obtained that secondary meaning, and in the view of the Court the probability was that it had not, because a very large number of the ordinary public who might buy a lamp bearing the name "Pope" would not have the smallest notion of the name of the company by which that lamp was made. But there was a large body of evidence from persons engaged in the trade, including in that term persons familiar with the habits and customs of the trade, that in the trade the name "Pope" applied in this way had come to denote the lamps manufactured by the applicant company.

A. J. Walter, K.C., and *J. Hunter Gray*, for the applicant company. The word "Pope" being a surname, the applicant company cannot seek to register it under par. 1 of s. 9, because it is not represented in a special or particular manner. The application is therefore made under par. 5 of the section, which empowers the Court to order that a name shall be deemed to be a distinctive mark, and by the next paragraph "distinctive" for the purpose of the section is defined to mean "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons." The first question therefore is whether the word "Pope" is in its nature adapted to distinguish the goods of the applicant company from those of other persons, and it is submitted it is. The surname of a manufacturer is pre-eminently adapted to distinguish his goods from those of other manufacturers. Even if the word is not in its nature adapted to distinguish, it has by user become distinctive, and in determining whether a trade mark is adapted to distinguish the Court may,

WARRINGTON J.
1911
POPE'S ELECTRIC LAMP COMPANY'S APPLICATIONS, *In re.*

under s. 9, take into consideration the extent to which user has rendered such trade mark in fact distinctive. Here there is strong evidence that the name "Pope" has come to denote the applicant company's goods and no others. Sect. 44 protects the bona fide use by any person of the name of "Pope" of that name in connection with his goods.

[WARRINGTON J. Prima facie a name is not distinctive. There is this in the applicant company's favour, that the word "Pope" is part only of its name.]

In *In re National Starch Co.'s Application* (1) "Oswego" was part only of the name of the article in respect of which it was sought to be registered as a trade mark, and its registration was allowed. [They also referred to *In re California Fig Syrup Co.* (2); *In re W. & G. Du Cros' Application.* (3)]

Sir Rufus D. Isaacs, A.-G., Sir J. Simon, S.-G., and *Sargant,* for the registrar. The present case is important as being the first which has come before the Court under s. 9, par. 5, with reference to the use of a surname. Whether or not the Court ought to permit the registration of a particular name is a matter entirely within its discretion. If the applicant company has succeeded in satisfying the Court that the name "Pope" is adapted to distinguish its goods from those of others, it has discharged part only of its obligation. It has further to shew that the Court ought in the exercise of its discretion to make an order that the name is to be deemed distinctive. In the first place it is submitted that a surname is not in its nature adapted to distinguish the goods of one trader from those of another trader of the same name. Here it cannot be said that the name "Pope" is adapted to distinguish the goods of the applicant company from those of other manufacturers of the name of "Pope." The fact that the name "Pope" has hitherto distinguished the applicant company's goods is no proof that it is "adapted to distinguish" them. If then the name is not "adapted to distinguish" them no amount of user can make it so. The Court has the widest discretion as to allowing applications

(1) [1908] 2 Ch. 698.
(2) [1909] 2 Ch. 99; [1910] 1 Ch. 130, 148.
(3) (1911) 28 Rep. Pat. Cas. 413; [1911] W. N. 139.

of this kind to proceed: *In re Gramophone Co.'s Application* (1); *In re Leopold Cassella & Co.* (2); *In re Joseph Crosfield & Sons, Ld.* (3) The Court must have regard to the future. It is possible that hereafter a person of the name of Pope may desire to enter into the electric lighting business and to carry on a business in his own name, in which case, if the present application is granted, the onus will be cast upon him under s. 44 of the Act of discharging himself from the inference of mala fides. The applicant company is seeking to obtain a monopoly of a common surname. This is contrary to the policy of the Legislature, which has been to leave it open to traders to use their own names in connection with their goods. There is this further objection, that if the names of individuals are allowed to be registered as trade marks after a few years' user, there would seem to be no necessity of devising or registering any other marks, and the result might conceivably be that a trade mark registry would consist solely of surnames, which would naturally be an absurdity. It is submitted, therefore, that the Court ought in the exercise of its discretion to refuse to allow the applicant company to proceed with the registration of its proposed mark.

J. Hunter Gray in reply.

Warrington J. This is an application by a company called Pope's Electric Lamp Company, Limited, for an order of the Court under s. 9, par. 5, of the Trade Marks Act, 1905, declaring that the name "Pope" is to be deemed a distinctive mark, and that the registrar is accordingly to proceed with the application of the present applicant to register that mark. The facts are these. [His Lordship stated the facts as above set forth, and continued.] Those are all the material facts. The question of law on those facts arises on s. 9 of the Trade Marks Act, 1905, upon which from time to time there has been so much discussion. That section provides that "A registrable trade mark must contain or consist of at least one of the following essential particulars:" The first of those is "the name of a company,

(1) [1910] 2 Ch. 423, 434. (2) [1910] 2 Ch. 240.
(3) [1910] 1 Ch. 130, 141.

WARRINGTON J.
1911
POPE'S ELECTRIC LAMP COMPANY'S APPLICATIONS, *In re.*

individual, or firm represented in a special or particular manner." There are then given three other classes of essential particulars to which I need not refer further, and then comes par. 5, which gives rise to the question in the present case, "any other distinctive mark." That is how the essential particular is there described, but it is qualified by these words: "but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.), (3.) and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark." I ought, perhaps, to have referred to par. 4, because that expressly excludes from the words which can be registered under that paragraph a surname. Paragraph 4 is: "A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname." There is no question, therefore, that prima facie a surname, unless it is the name of a company, individual, or firm represented in a special or particular manner, cannot be registered. Is this name "Pope" under the circumstances to be deemed to be a distinctive mark? It is important to notice that I have not to come to the conclusion whether it is a distinctive mark, but I have to say whether it is to be deemed to be a distinctive mark. It has been pointed out in the Court of Appeal in *In re Joseph Crosfield & Sons, Ld.* (1), and the other cases dealt with in the judgments in that case, that a very wide discretion is left to the Court in this matter. I have read the section so far, but it is necessary now to read the concluding paragraphs of it because they explain what is meant by a distinctive mark. The first of those is this: "For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons," and then that is further qualified by the last paragraph: "In determining whether a trade mark is so adapted"—that is, adapted to distinguish the goods of the proprietor of the trade mark from those of other persons—"the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact

(1) [1910] 1 Ch. 130.

distinctive for the goods with respect to which it is registered or proposed to be registered." It is quite plain from those words that, though the Court may come to the conclusion that the user has rendered the mark in fact distinctive, it does not follow that it has rendered the mark adapted to distinguish. I think it is quite clear from the context that the word "distinctive," occurring at the end of that last paragraph of the section, is not used in the sense which the Legislature has a few lines previously said it shall bear for the purposes of the section, but is there used in a different sense.

The first question that has to be determined is: Is the name which the applicant company desires to register, in its nature, adapted to distinguish the goods of the proprietor from those of other persons? In my opinion this name (I say nothing whatever about other names), being for all essential purposes the name of the manufacturer, is not adapted to distinguish the goods of that manufacturer from the goods of all other manufacturers, or rather from the goods of other persons. There are many persons of the name of "Pope," and the name of one man named "Pope" is not adapted to distinguish his goods from those manufactured by other persons of the name of "Pope." It seems to me, therefore, that the name, to begin with, is not in its nature adapted to distinguish the goods of the proprietor of the trade mark from those of other persons, and, if it is not in its nature so adapted, then it seems to me that it cannot become so adapted by any amount of user, and I think that that is in accordance exactly with what was said by Fletcher Moulton L.J. in the *Crosfield Case* (1) in reference to such words as laudatory epithets. He was there only dealing with one particular class of words which are not in their nature adapted to distinguish the goods, but his remarks would apply to any other kind of word which is not adapted to distinguish the goods. To come to that conclusion would in my opinion be enough of course to entitle the registrar to succeed in obtaining the dismissal of this application, because if the word is not in its nature adapted, then it cannot be right to say that in the particular case it shall be deemed to be adapted.

(1) [1910] 1 Ch. 130, 148.

WARRINGTON J.

1911

POPE'S ELECTRIC LAMP COMPANY'S APPLICATIONS, *In re.*

But the case does not stop there, and I think I must deal with the other part of it. Assume for the moment that the word can be in its nature adapted to distinguish the goods of the particular trade from the goods of other traders. If it can be, then the Court is entitled—not obliged, but entitled—to take into consideration the extent to which the user has rendered such trade mark in fact distinctive. The evidence in this case, as I have already said, is that to a large extent in the trade the user has rendered the trade mark distinctive, and supposing I were to come to the conclusion that the word is capable of being adapted to distinguish, and that the user has rendered it adapted to distinguish, still I am met with the further question, Is the case one in which the Court ought to make the order that it is to be deemed a distinctive mark, that is to say, deemed to be adapted to distinguish, and so entitled to registration? I do not think it is. It seems to me it would come to this, that it would probably become the duty of the Court in the case of the name of very nearly every manufacturer of well-known goods, goods in common use, to direct the registrar to proceed with the registration of the name as a trade mark. I cannot believe that that was the result contemplated by the Act. If that result had been contemplated by the Act, I cannot believe that it would, in the first paragraph of the section, have rendered it essential that the name, if that was to be the trade mark, should be represented in a special or particular manner, or that it would, in the fourth paragraph, have expressly excluded a surname from that which could be registered under that paragraph.

I think, therefore, first, that the name is not in its nature adapted to distinguish; secondly, that even if it is in its nature adapted to distinguish and the evidence establishes that it has become by user in fact distinctive, the Court ought not to make the order asked for. I must, therefore, refuse the application.

Solicitors: *Ravenscroft, Woodward & Co.; Solicitor to the Board of Trade.*

W. I. C.

WARRINGTON J.
1911
May 30, 31.

In re THOMAS.
BARTLEY *v.* THOMAS.

[1910 T. 1760.]

Administration Action—Practice—Sale of Real Estate—Conditional Contract—Order of Master approving Contract—Order not passed and entered—Finality of Order—Adjournment to Judge.

An order made by a Master in chambers is not complete and binding on the parties until it is passed and entered. Although the settled practice in chambers is that an adjournment of a summons to be heard by the judge will not be granted unless an application is made to the Master, at the time when the summons is heard by him, either for an adjournment or for time to consider whether an adjournment shall be asked for, yet the Master or the judge has jurisdiction at any time before the Master's order becomes finally binding on the parties by being passed and entered to adjourn the summons to be heard by the judge.

Dictum of Malins V.-C. in *In re Bartlett* (1880) 16 Ch. D. 561, 568, distinguished.

In a creditors' action to administer an intestate's estate the usual judgment had been pronounced directing, amongst other things, a sale of the real estate in case the personal estate should be insufficient for the payment of the debts. A conditional contract had been entered into for the sale of the real estate, which on a summons taken out by the plaintiff had been confirmed by the Master in chambers, but the order had not been passed and entered. On applications by creditors for liberty to attend the proceedings under the administration judgment on the ground that the sale was at an undervalue, and by the purchaser that the order confirming the sale might be forthwith passed and entered and the sale carried into effect :—

Held, that, the Master's order not having been passed and entered, the matter was still open, and the proper course was to treat the summons to confirm the sale as adjourned to the judge.

Held, also, on the facts, that the contract was not one which the Court ought to sanction.

Adjourned Summonses.

The only question calling for a report in this case was whether an order made in the course of an administration action by a Master in chambers approving a conditional contract for the sale of certain real estate, but which had not been passed and entered, was binding on the parties.

The facts were as follows: John Owen Thomas died intestate

WARRINGTON J.
1911
THOMAS, *In re.* BARTLEY *v.* THOMAS.

on November 16, 1910. Shortly after his death an action was commenced by a creditor for the administration of his estate. On December 16, 1910, judgment for administration of the real and personal estate at the instance of a creditor was pronounced. That judgment was in the usual form, and, after directing the accounts and the inquiries relating to personal estate, ordered the personal estate to be applied in payment of the deceased's debts and funeral expenses in due course of administration, and, in case such personal estate should be insufficient for the payment of his debts and funeral expenses, then certain further inquiries and accounts were to be made and taken, namely, the usual inquiries as to real estate, followed by a direction that a sufficient part of the intestate's real estate to make good the deficiency of his personal estate, or (if necessary) the whole of such real estate, should be sold with the approbation of the judge. The judgment further appointed one John Henry Jones receiver of the rents and profits of the real estate.

The intestate was possessed of a farm with a house upon it of a little more than twenty acres, situated in the neighbourhood of Llandudno. It layat the head of a valley, the lower part of which was occupied by a public park called the Happy Valley, which was presented by Lord Mostyn to the town of Llandudno. The farm was separated from that park by a small piece of land also belonging to Lord Mostyn. The urban district council of Llandudno, since the death of the intestate, had been minded, when the property should, as they expected it would, be put up for sale, to purchase it, with a view (either with or without obtaining from Lord Mostyn the intervening land) of making use of it for public purposes connected with the town of Llandudno.

Early in February, 1911, one Mr. Thomas Gwilym James, hearing that the property was for sale, approached Mr. Johnson, the solicitor in the administration action, who was acting as solicitor for both parties, the plaintiff and defendant, and offered him 1500*l.* for the property. At that moment the only evidence of value was the valuation for the purpose of obtaining the grant of letters of administration, in which this property had been valued at 1200*l.* Mr. Johnson then went to another gentleman, Mr. George Humphreys, who had been making some

vague suggestions as to the purchase of this property, and ascertained from him that he would not give more than 1500*l*. The property had never been advertised, no offers had been invited, nor had there been any attempt to sell it by auction. The opinion of a Mr. Farrington, a surveyor, was then obtained, which was to the effect that the price of 1500*l*. was, in his opinion, "the full and fair value" and "fully as much as would probably be obtained at a sale by public auction." Thereupon the receiver entered into a conditional contract for sale of the property to Mr. James for 1500*l*.

It did not appear from the evidence that there was any bargaining or any attempt to get the purchaser to give a larger price. The conditional contract contained the following stipulation: "The vendor is the receiver of the estate of the said John Owen Thomas now deceased, appointed by the Chancery Division of the High Court of Justice, and he shall forthwith apply for and endeavour to obtain the approbation of the Chancery Division to this contract, and in case such approbation cannot ultimately be obtained the present agreement shall be void."

On the contract being entered into an application was made originally by the receiver, but it was pointed out that that was informal, and it was accordingly made by the plaintiff, for the confirmation of the contract. The application was by summons. It came before the Master on March 14, 1911. He had before him an affidavit of the receiver as to the assets and liabilities of the estate, from which it appeared that the personal estate would probably be insufficient to pay the debts and that a sale of the real estate would be necessary. He also had before him an affidavit of Mr. Farrington, the surveyor, who had been consulted by the solicitor for the parties. The Master had no evidence before him shewing why it was proposed to sell by private contract, or why no attempt had been made to advertise or to obtain offers. He thereupon purported to make, on behalf of the judge, an order confirming this conditional contract. That order had not been drawn up. The parties to it of course did not ask to have the matter adjourned to the judge, for there was nobody to ask. The only persons before the Master were the

WARRINGTON J.
1911
THOMAS, *In re.*
BARTLEY *v.* THOMAS.

applicants for the order. Apparently the order was stopped because the chief clerk of the Master, who was preparing the certificate under the judgment, doubted whether the time had arrived for making the sale.

Some short time after the conditional contract had been confirmed, the district council heard of what had happened, that is to say, they heard that Mr. James had agreed to purchase the property for 1500*l.* They offered him 1000*l.* for his bargain. At first Mr. James seemed willing to entertain the proposition, and a certain amount of bargaining went on between him and the council, but he finally declined to sell. The council then made further inquiries, and ultimately, happening as they did to be creditors of the estate, and therefore as such interested in obtaining as good a price as possible for the property, they issued a summons asking that they might be at liberty to attend the proceedings under the judgment of December 16, 1910, and that the plaintiff might be directed to give notice from time to time to them, through their solicitors or agents, of all proceedings to be had and taken under the judgment. That summons was taken out on April 24, 1911, and on May 11 the purchaser took out a summons asking that the order of March 14, 1911, confirming the sale might be passed and entered and the sale carried into effect.

At the hearing it was agreed by the parties that the two summonses should be heard together, and that the case should be treated as if the summons for confirmation of the contract had been adjourned from the Master to the judge. It was admitted that if the matter was now open the contract was not one which the Court could be asked to approve.

Buckmaster, *K.C.*, and *T. J. C. Tomlin*, for the Llandudno Urban District Council. The order of the Master approving the provisional contract not having been passed and entered, the Court has undoubted jurisdiction to direct the summons to confirm to be adjourned to the judge, notwithstanding that the time for applying for an adjournment has passed. *In re Bartlett* (1), in which Malins V.-C. held that the certificate of

(1) 16 Ch. D. 561.

the chief clerk, although not passed and entered, was tantamount to a confirmation of the contract, is distinguishable. There there were persons before the Master who could have required an adjournment to the judge, and there had been the utmost publicity. That case, therefore, has no application to a case like the present, where there was no person before the Master who could have asked for an adjournment to the judge and where there was no publicity. If, therefore, the matter is now open, as it is submitted it is, the Court ought to direct that the property should be put up for sale by public auction, and in the event of its being so put up the council are willing to undertake to start the biddings with a bid of 2800*l.*

P. F. S. Stokes, for the defendant, took no part in the argument.

Cave, K.C., and *E. P. Hewitt*, for the plaintiff.

[WARRINGTON J. Cannot a matter before a Master be adjourned to the judge at any time?]

Under Order LV., r. 69, any party may, before the proceedings before the Master are concluded, take the opinion of the judge upon any matter arising in the course of the proceedings, without any fresh summons for the purpose. In the present case no application was made to the Master when the summons was before him for adjournment to the judge or for time to consider whether an adjournment should be asked for, and under those circumstances the proper course for the council was to move to discharge the order: per Pearson J. in Practice note, [1884] W.N. 218; Annual Practice, 1911, vol. i. p. 928. [They also referred to *Millican* v. *Vanderplank* (1), *In re Oriental Bank Corporation.* (2)]

[WARRINGTON J. referred to *Scott* v. *Homer* (3) and *Harrington* v. *Ramage.* (4)]

J. G. Wood, for the purchaser. The purchaser is a bona fide and independent purchaser, and as such he is entitled to be treated with consideration by the Court. "In sales by the Court there should be at least as much good faith shewn towards the purchaser as, and perhaps a little more than, is required

(1) (1853) 11 Hare, 136.
(2) (1887) 56 L. T. 868.
(3) (1890) 60 L. J. (Ch.) 238.
(4) [1907] W. N. 137.

WARRINGTON J.
1911
THOMAS, *In re.*
BARTLEY v. THOMAS.

by ordinary vendors out of Court" : per Jessel M.R. in *In re Banister*. (1) The proceedings before the Master were perfectly regular and proper. No order was necessary. All that was required by the contract was that the receiver should apply for and endeavour to obtain the approbation of the Court to the contract. That requirement was satisfied when the Master expressed his approbation. From that moment the purchaser's rights crystallized and the contract became binding: *In re Bartlett*. (2)

[WARRINGTON J. In that case the chief clerk signed the certificate confirming the sale.]

The purchaser there did not rely on the certificate. What the council are here seeking to do is to let in the mischief of reopening biddings which was put an end to in the case of sales by auction by the Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48) : see observations of Chitty J. in *In re Oriental Bank Corporation*. (3) If in the case of a sale by auction the right of the purchaser attaches the moment the auctioneer's hammer falls, so here, the right of the purchaser ought to attach the moment the Master intimates his approval of the contract. The manner in which that approval is to be put on record is mere machinery and does not affect the purchaser. The purchaser is a purchaser under s. 70 of the Conveyancing and Law of Property Act, 1881, and is protected by it. The right to have the matter adjourned to the judge cannot continue indefinitely as against the purchaser. Directly the Master has expressed his approval of the contract he is functus officio.

Buckmaster, K.C., in reply.

WARRINGTON J. This is a very important case, not only to the parties engaged in it, but from the point of view of the practice of the Court. The real question I think is whether a conditional contract for sale of certain land has been finally confirmed by the Court or not. The purchaser says that it has, and that, having been finally confirmed, the matter cannot now be

(1) (1879) 12 Ch. D. 131, 141. (2) 16 Ch. D. 561.
(3) 56 L. T. 868, 872.

reopened. The question is whether under the circumstances of this case the sale by this conditional contract has or has not been thus finally confirmed.

The facts are these: [His Lordship stated the facts substantially as above set forth, and continued.]

Now, avowedly the application by the council for leave to attend the proceedings is made simply with the view of laying before the judge the circumstances attending this sale, and the facts shewing that the sale was at a gross undervalue, in order to induce the judge, if the matter is still open, to now refuse to confirm that sale; and they have through their counsel submitted not only to attend at their own expense, but even to pay any additional costs which might be occasioned by their so attending. The two summonses are now before me, and it has been agreed that I should hear the whole of the facts and should then determine whether there was or was not a final and binding bargain brought about by the approbation of the Master, and one therefore which the judge ought not to disturb, or whether the matter is still open, and it is competent to the judge to say whether the contract shall or shall not be confirmed. It is beyond dispute that, if the matter came before me now on the facts which I now know, nobody would dream of asking me to confirm this conditional contract; and I doubt whether, if it had been brought before me, as it was before the Master, with anybody present to criticize what had been done, to point out for example that here was a sale by private contract with no previous attempt to sell by auction, no attempt to obtain competition—if there had been anybody before me on the original application to criticize the matter and point those things out, I am quite certain that I should not, and I express my belief that the Master in such circumstances would not, have confirmed this sale. But there was no such person thus to bring the matter before the judge. I am quite satisfied, therefore, if the matter is open, that this is not a contract which I ought to confirm.

Now, is the matter open? The purchaser says that all that was provided for by this contract was that the receiver should apply for, and endeavour to obtain, the approbation of the Chancery

WARRINGTON J.
1911
THOMAS, *In re.*
BARTLEY *v.* THOMAS.

Division to this contract, and in case such approbation could not ultimately be obtained the agreement should be void; and he says that that provision is satisfied when the Master has said "I approve of this contract," whether that approval is recorded in the form of a note, or whether it is made in the form of an order or not. As a matter of fact the Master here purported to make an order, and I think it was necessary that he should make an order, because at that moment the order for sale with the approbation of the judge was a conditional order. He could make it because he had jurisdiction to do so under Order LI., r. 1. He intended to make an order. What is it that renders an order finally effective so that there is no longer any possibility of going back from it? It seems to me that it is the passing and entering of the order. It is the everyday practice that, until an order is passed and entered, the matter can be brought before the judge, and if a mistake has been made it can be put right. But the matter does not rest there. This was an order made by the judge in chambers, that is to say, in this particular case made by the Master as the deputy of the judge. It is the right of any party interested to adjourn a question from the judge's deputy to the judge himself. It is undoubtedly the practice, as a general rule, that, if a party wishes to obtain the opinion of the judge in person, he must ask for an adjournment for that purpose at the time the Master proposes to make the order, or, at all events, ask for time to consider whether he will ask for an adjournment. That, undoubtedly, is the usual practice in chambers, and it is a very convenient practice. But, although that is the practice, it seems to me that the judge has power, or the Master has power, to direct an adjournment at any time before the order becomes finally binding by being passed and entered; and what I propose to do, in order to remove any technical difficulty, is now to direct that this matter shall be treated as adjourned to me, and to deal with it as if I had the application for confirmation of the contract now before me. I think that is the correct way of dealing with the matter for the reason that, until the order is finally passed and entered, it leaves open an opportunity of reviewing and reconsidering what has been done.

Treating it in that way, I conceive that I m doing nothing

contrary to the views expressed by Malins V.-C. in *In re Bartlett* (1), where he said that, in his opinion, "the confirmation took place when the chief clerk decided upon making the order confirming the contract." Whether it occurred to the learned judge to deal with the matter as if it was still capable of being adjourned to him or not, I do not know, but it is quite clear that if it had occurred to him it would have made no difference, because he was of opinion that the chief clerk in that case had done right, and that if it had been adjourned to him he would have confirmed the chief clerk's order. He had not to consider the question which I have to consider, namely, whether, where it is quite clear that the order made by the Master is not one which ought to have been made, it is competent to the judge to treat the matter as still open and as if it had been adjourned to him.

In my opinion the matter is still open, and, being open, the contract is plainly one which ought not to be confirmed. I need make no formal order giving the council liberty to attend. I propose to make one order on all three summonses, namely, the summons for confirmation of the contract, the summons by the council, and the summons by the purchaser, and in that order to decline to confirm the contract, to direct the property to be put up for sale by auction with the approbation of the judge, and to take from the council an undertaking that they at such auction will start the biddings with a bid of 2800*l*. With regard to the costs, the council must of course bear their own costs. I think the costs of the other parties, the plaintiff and the defendant, must be costs in the action, and I think I ought to tax the costs of the purchaser and direct them to be paid out of the intestate's estate. The purchaser will be entitled to the return of his deposit with whatever interest it has earned since the date on which he paid it.

Solicitors: *Lees & Co., for A. Conolly, Llandudno; Chamberlain & Co., for Chamberlain & Johnson, Llandudno; Charles Russell & Co.; Crowders, Vizard, Oldham & Co., for Humfrys & Symonds, Hereford.*

(1) 16 Ch. D. 561, 568.

W. I. C.

C. A. 1911 *May* 17, 18.

ANDREWS *v.* ABERTILLERY URBAN DISTRICT COUNCIL.

[1910 A. 477.]

Electric Light—Breaking up Street—Street not repairable by Local Authority—Ultra vires—Trespass—Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 56), *ss.* 12, 13—*Electric Lighting* (*Clauses*) *Act*, 1899 (62 & 63 *Vict. c.* 19), *Schedule*, *s.* 12, *sub-s.* 2.

Under ss. 6 and 7 of the Gasworks Clauses Act, 1847, as adapted to electric lighting undertakings by the Electric Lighting Act, 1882, the undertakers are empowered to break up streets, subject to certain restrictions. By s. 13 of the Act of 1882 (which is substantially repeated in s. 12, sub-s. 2, of the schedule to the Electric Lighting (Clauses) Act, 1899), nothing in that Act or in any Act incorporated therewith shall authorize the undertakers to break up any street which is not repairable by the local authority without the consent of the person by whom such street is repairable or the written consent of the Board of Trade to be given after notice to such person and after an opportunity has been given to him to state his objections thereto :—

Held (Kennedy L.J. dissenting), that, where there was no person by whom the street was repairable, the section operated as an absolute prohibition against the breaking up of the street by the undertakers.

Held, therefore, that, where a strip of land adjoining a street repairable by the local authority had been dedicated to the public by the owner and had become part of the street, but was not repairable either by the local authority or by the owner or by any other person, the local authority, as undertakers for the supply of electric light in their district, had no power to break up that portion of the street.

Appeal from a decision of Warrington J.

The plaintiff was the owner of the Royal Oak Hotel and other houses in the Crumlin Road in the parish of Llanhilleth, Monmouthshire. The defendants, as the undertakers under a provisional order of 1901 for the supply of electric light and energy in their district, erected certain standards, hereinafter referred to as standards "A," "B," and "C," in Crumlin Road for the purpose of carrying overhead mains. The plaintiff alleged that these standards and mains were placed on and over his land without his consent and brought an action for a mandatory injunction requiring the defendants to remove them. The action was based upon trespass and nuisance.

The Royal Oak Hotel was built by the plaintiff's father, who was his predecessor in title, and in building it he set back the frontage four or five feet from Crumlin Road and covered the intervening strip with pavement. He also built two cottages, the frontages of which he set back in the same way. The plaintiff also built other cottages on his property and set back the frontages in the same way. While these cottages were in the course of erection the defendants were minded to widen the road, and purchased a narrow strip of land from the plaintiff for this purpose.

The purchase was effected by an indenture dated December 12, 1898, whereby, after reciting that the plaintiff agreed to sell and the defendants in pursuance of the powers vested in them by s. 154 of the Public Health Act, 1875, and with the sanction of the Local Government Board, agreed to purchase, for the purpose of widening the highway leading from Aberbeeg to Crumlin within their district, the lands and hereditaments intended to be thereby conveyed at the price of 54*l.* odd, the plaintiff as beneficial owner conveyed to the defendants "the surface of all those pieces of land situate adjoining the Royal Oak Inn in the parish of Llanhilleth in the county of Monmouth containing 260 square yards or thereabouts which said pieces or parcels of land are delineated in the plan annexed hereto To hold the said pieces or parcels of land unto and to the use of the purchasers in fee simple subject nevertheless to the right of the owner or owners lessee or lessees of the mines and minerals under the said pieces of land to work and get the same in the same manner as if the said pieces of land had not become vested in the purchasers but so nevertheless that in such working and getting no damage shall be done to the said road or highway."

The land so conveyed included the strips in front of the plaintiff's houses other than the Royal Oak Hotel, but did not include the paved strip in front of the hotel. This paved strip had been dedicated by the plaintiff's father to the use of the public and had become a highway in the sense that the public had a right of passage over it, but, as the Court found, it had never become a highway repairable by the inhabitants at large and remained the property of the plaintiff. The plaintiff, although

C. A. 1911

ANDREWS v. ABERTILLERY URBAN COUNCIL.

under no legal obligation to do so, had repaired the pavement from time to time.

Under the Abertillery Electric Lighting Order, 1901, the defendants were authorized to supply electric light and energy to the whole of their district. This order, which was duly confirmed by Act of Parliament (1 Edw. 7, c. xxxvii.), was granted by the Board of Trade under the Electric Lighting Acts, 1882 and 1888, and it incorporated, with some immaterial exceptions, the provisions of the schedule to the Electric Lighting (Clauses) Act, 1899. (1)

By s. 5 of the order the undertakers were specially authorized to break up the streets not repairable by the local authority

(1) Sect. 12 of the Electric Lighting Act, 1882, incorporated the Lands Clauses Acts, except (inter alia) the enactments with respect to the purchase and taking of lands otherwise than by agreement, and the provisions of the Gasworks Clauses Act, 1847, with respect to the breaking up of streets, and the section contained a clause adapting those provisions to electric lighting undertakings.

Sect. 13 provided as follows: "Nothing in this Act or in any Act incorporated therewith shall authorise or empower the undertakers to break up any street which is not repairable by the local authority, or any railway, or tramway, without the consent of the authority, company, or person by whom such street, railway, or tramway is repairable, unless in pursuance of special powers in that behalf inserted in the license, order, or special Act, or with the written consent of the Board of Trade, and the Board of Trade shall not in any case insert any such special powers in any license or provisional order, or give any such consent until notice has been given to such authority, company, or person by advertisement or otherwise, as the Board of Trade may direct, and an opportunity has been given to such authority, company, or person to state any objections they may have thereto."

Sect. 12, sub-s. 2, of the schedule to the Electric Lighting (Clauses) Act, 1899, provided as follows: "Nothing in the Special Order shall authorise or empower the undertakers to break up or interfere with any street or part of a street not repairable by the local authority or any railway or tramway, except such streets, railways or tramways (if any), or such parts thereof, as they are specially authorised to break up by the Special Order, without the consent of the authority, company, or person, by whom that street, railway, or tramway is repairable, or of the Board of Trade under section thirteen of the Electric Lighting Act, 1882, and where the Board of Trade give that consent, the provisions of the Special Order shall apply to the street, railway, or tramway to which the consent relates as if the undertakers had been specially authorised to break it up by that Order."

mentioned in the Second Schedule thereto. These streets did not include Crumlin Road. By s. 6 the streets and parts of streets throughout which the undertakers were to lay down suitable and sufficient distributing mains for the purposes of general supply were those mentioned in the Third Schedule thereto. These streets included Crumlin Road.

The period limited by the order for the execution of the works was from time to time extended. In 1907 the defendants obtained the sanction of the Board of Trade as required by s. 10 (*b*) of the schedule to the Electric Lighting (Clauses) Act, 1899, to the supply of electrical energy by means of overhead wires in (among other streets) Crumlin Road. In 1909 they commenced working in Crumlin Road and proceeded to break up the road and to erect standards for the carriage of overhead wires. They erected standards "A" and "B" in front of and close to two of the plaintiff's houses on land which they had acquired under the conveyance of December 12, 1898, and they erected standard "C" on the paved strip in front of the Royal Oak Hotel. These standards consisted of two iron posts braced together by struts, and one of the posts of standard "C" was fixed into the footings of the wall of the plaintiff's hotel. The standards were either twenty-three or twenty-seven feet high, but the evidence left it in doubt which was the correct height.

Warrington J. with respect to standards "A" and "B" held that the conveyance of December 12, 1898, passed to the defendants the whole of the land therein mentioned, including the space above and below the surface, with the exception of the minerals, and that these standards were erected on land vested in the defendants. With regard to standard "C" he held, upon the construction of s. 13 of the Electric Lighting Act, 1882, and s. 12, sub-s. 2, of the schedule to the Electric Lighting (Clauses) Act, 1899, that there was nothing in those sections to prevent the undertakers breaking up that part of the road in front of the plaintiff's hotel without his consent, inasmuch as the plaintiff, being under no legal liability to repair it, was not a person whose consent was required. He held further that the effect of s. 6 of the provisional order was to authorize the local authority to lay distributing mains throughout the whole length of Crumlin Road,

C. A. 1911. ANDREWS v. ABERTILLERY URBAN COUNCIL.

and as incidental to that work to place the standards in soil belonging to the plaintiff,—*Escott* v. *Newport Corporation* (1)—and that the plaintiff's proper remedy (if any) was to apply for compensation under s. 68 of the Lands Clauses Consolidation Act, 1845. He also found that there was no nuisance. He accordingly dismissed the action.

The plaintiff appealed.

Macmorran, K.C., Clauson, K.C., and *A. A. Bethune,* for the appellant. Standards "A" and "B" have been erected on land purchased by the respondents from the appellant for the purpose of widening the road and are in a different position from "C," which is placed on a part of the road which, though dedicated to the public use, is not repairable by the respondents and remains the property of the appellant. In each case the question whether the respondents have exceeded their powers in erecting these standards where they have erected them turns upon the construction of the Gasworks Clauses Act, 1847, and the Electric Lighting Act, 1882, and the Electric Lighting (Clauses) Act, 1899. Sect. 12, sub-s. 2, of the Electric Lighting Act, 1882, incorporates the provisions of the Gasworks Clauses Act, 1847, with respect to the breaking up of streets. Sect. 13 of the Act of 1882 and s. 12, sub-s. 2, of the schedule to the Electric Lighting (Clauses) Act, 1899, prohibit the undertakers from breaking up streets not repairable by the local authority without the consent of the person by whom the street is repairable or the consent of the Board of Trade given after notice to that person. The respondents have erected "C" without notice to the appellant and without his consent on his land and on a part of the road which is repairable by him. Further, by s. 7 of the Act of 1847 the undertakers are forbidden to place any work against any building without the owner's consent, but the respondents have actually cut into the footings of the appellant's wall in order to set up "C." The learned judge did not deal with the latter point in his judgment, and he has held that there is no person within s. 13 of the Act of 1882 (which is substantially repeated in s. 12, sub-s. 2, of the schedule to the Act of 1899) by

(1) [1904] 2 K. B. 369.

whom the part of the road on which "C" is placed is repairable, and consequently that the respondents are not within the prohibition in that section. But that is taking too narrow a view of the section. It is submitted that this part of the road is repairable by the appellant, who can be called upon by the respondents to repair under s. 150 of the Public Health Act, 1875,—*Property Exchange, Ld.* v. *Wandsworth Board of Works* (1) —and under s. 19 of the Public Health Acts Amendment Act, 1907.

[*Cave, K.C.* The provisions of that Act were applied to this district long after the commencement of the action.]

Assuming that the appellant is under no legal obligation to repair, the intention of the Legislature was to divide streets into those repairable by the inhabitants at large and those repairable by somebody else, and this part of the street is repairable by the appellant for his own use. The case for the removal of "A" and "B" depends primarily on the construction of the conveyance of December 12, 1898. Having regard to the purpose (which appears from the recital) for which the land was required, the intention of the parties was to grant a limited interest only. Under s. 149 of the Public Health Act, 1875, which provides for the vesting of streets in urban authorities, only so much of the soil passes as is required for the purposes of the highway: *Tunbridge Wells Corporation* v. *Baird* (2); and the same principle has been applied to the space above the road: *Wandsworth Board of Works* v. *United Telephone Co.* (3); *Finchley Electric Light Co.* v. *Finchley Urban Council.* (4) This conveyance was drawn with the idea of conveying some such interest as that, namely, the surface or skin of the road with only so much of the soil below and the air above as was requisite for highway purposes. Such a right of property can be conveyed: *Escott* v. *Newport Corporation* (5); *Portsmouth Corporation* v. *Hall.* (6) These standards are of such a height that they go beyond the area of user, and to the extent to which they are above the stratum of air required for the user of the

(1) [1902] 2 K. B. 61.
(2) [1896] A. C. 434.
(3) (1884) 13 Q. B. D. 904, 915.
(4) [1903] 1 Ch. 437.
(5) [1904] 2 K. B. 369.
(6) (1907) 71 J. P. 564.

C. A. 1911 ANDREWS v. ABERTILLERY URBAN COUNCIL.

street they are in land not dedicated to the public use, which remains the property of the appellant. Under s. 7 of the Gasworks Clauses Act, 1847, no work may be placed in such land without the consent of the owner, and therefore the appellant's consent to the erection of these standards also is required.

Cave, K.C., and *C. Church*, for the respondents. As to "A" and "B" the learned judge was right in saying that the standards were placed on the respondents' own soil. In conveyancing language the common distinction is between surface and minerals. But assuming the construction placed by the learned judge on the conveyance to be wrong, the respondents have purchased a certain stratum of land and have put that land on the same footing as the rest of the street. They have widened a repairable public road, and the addition is repairable in the same way: *Portsmouth Corporation* v. *Hall.* (1) Upon any view of the conveyance it vests in the respondents a sufficient interest to enable them to erect these standards, which are necessary to the proper use of the highway by the public, inasmuch as they are required for lighting the street: *Fareham Local Board* v. *Smith.* (2)

Both s. 6 of the Gasworks Clauses Act, 1847, which empowers the undertakers to break up streets, and s. 17 of the Act of 1882 provide that compensation is to be made for any damage done by the undertakers in the exercise of their powers, and therefore it cannot be said that the respondents are injuring people without compensating them. The consent of the Board of Trade under s. 10 of the schedule to the Act of 1899 to the carrying of overhead wires in Crumlin Road extends to the erection of the standards to carry the wires. The respondents have the right and duty of carrying overhead wires over this street, and they have the widest powers enabling them to place the standards along any part of the street, and this includes power to place them on private property provided it is part of the street—*Escott* v. *Newport Corporation* (3)—unless they are expressly prohibited by statute from doing so. As regards "C" it is said that s. 13 of the Act of 1882, which is simply carried on by s. 12, sub-s. 2,

(1) 71 J. P. 564.
(2) (1891) 7 Times L. R. 443.
(3) [1904] 2 K. B. 369.

of the schedule to the Act of 1899, requires that the appellant's consent should be given to the breaking up of the road, but in order to qualify a person to give that consent he must be legally liable to repair as a duty: *Reg.* v. *Wilson* (1); and if the road is not repairable by anybody in that sense no consent is required. The consent of the Board of Trade is only required where there exists some person whose consent was otherwise necessary and he has not given that consent. Therefore the section has no application. Then it is said that standard "C" has been let into the appellant's wall. That point was not pressed at the trial, and damages would be a sufficient remedy for any injury done to the wall.

Macmorran, K.C., in reply. The respondents' construction of s. 13 of the Act of 1882 cannot be maintained. The general prohibition at the commencement of the section governs the whole, and unless the undertakers obtain the consent either of the person responsible for the repair of the highway or of the Board of Trade the prohibition is absolute. The provision as to compensation in s. 17 of the Act of 1882 refers only to damage in the execution of the works and not to damage by their user when constructed: *Shelfer* v. *City of London Electric Lighting Co.* (2) That section has therefore no application.

Cozens-Hardy M.R. This is an appeal from a decision of Warrington J., who has dismissed an action brought by the plaintiff against the Abertillery Urban District Council claiming relief in respect of the erection by the council of three standards referred to as "A," "B," and "C," the height of those standards being somewhere between twenty-three and twenty-seven feet and the standards being placed very close to the wall of the admitted property of the plaintiff. The urban district council have been authorized by a provisional order of 1901 to act as undertakers for the purpose of lighting and power by means of electricity, and for that purpose they have had vested in them such powers as are found in the provisional order itself, and in the Electric Lighting Act, 1882, the Electric Lighting (Clauses) Act, 1899, and the Acts incorporated by reference with

(1) (1852) 18 Q. B. 348. (2) [1895] 1 Ch. 287.

C. A. 1911

ANDREWS v. ABERTILLERY URBAN COUNCIL.

Cozens-Hardy M.R.

those Acts; and the question is whether in erecting those standards "A," "B," and "C," or any of them, they have acted without any parliamentary authority, and have done what is ultra vires and improper. That those standards are an annoyance of a most serious kind to the plaintiff is too plain for argument. But it remains to consider whether, in respect of all or any of them, the plaintiff has a legal right which the defendants were not authorized to take away from him.

I think it will be convenient to deal first of all with "A" and "B." The road in question is Crumlin Road; it is a narrow road, and in one part of it there is the Royal Oak Hotel, which was built or rebuilt some thirty years ago; and the then owner, the predecessor of the plaintiff, was minded to throw back the building line and to throw de facto into the street over which the public had a right of passage a strip of roughly four feet, so that in front of the Royal Oak Hotel there is a portion of Crumlin Road which was thrown into the street, over which the public have rights, the plaintiff's predecessor in title having dedicated it to the public, but which is not repairable by the public. Then further to the south there is another strip of land which was acquired by the urban district council from the plaintiff under a deed of December 12, 1898, which was before the council were authorized to embark upon the electric lighting undertaking. [His Lordship read the deed, and continued.] The strip of land comprised in that conveyance includes the land upon which the standards "A" and "B" are erected, and the first point for our consideration is, what passed under this conveyance by the plaintiff to the urban district council? It was argued, not very strenuously, I think, but it was argued, that this was a conveyance in fee simple of the strip of land excepting and reserving the minerals; so that the urban district council got everything usque ad cœlum et usque ad inferos, except the mines and minerals. In my opinion that cannot be the true construction. I think the object and intent of this conveyance was to vest in the urban district council a stratum of indefinite dimensions below the surface of the road and above the surface of the road for the purposes of the road and for highway purposes only. In other words I think

it is impossible to construe this conveyance as giving the urban district council a greater interest in that strip than they would get under the clause to be found in various Acts of Parliament with which we are familiar, which vests in the urban authority streets as streets. But I think it is also quite clear that the effect of this conveyance amounted to a contract or agreement between the parties that this strip of land was to be dedicated to the public and was to be repairable by the public in exactly the same mode as the rest of the old road. In fact it would scarcely be possible to suggest that, that view having obtained between those parties, the urban district council could have required the adjoining owner (that is, the plaintiff) to make up and repair that piece of ground. I therefore regard that part of the strip where "A" and "B" standards are erected as being part of the road not only dedicated to the public but repairable by the public.

As regards the part where standard "C" is erected I think it is equally clear that that is land which is not repairable by the public, and that different considerations apply to these two parts having regard to the sections of the Electric Lighting Acts to which our attention has been called. I should mention that this standard "C" is not only erected on that part of the road which is not repairable by the public, but is actually fixed in and has been made part of the footings of the plaintiff's house.

What then is the law first of all as to "A" and "B"? They both stand in the same position. That depends upon several sections of the Acts of 1882 and 1899. Under those Acts the undertakers, that is to say, the urban district council in the present instance, have the widest powers, and indeed the duty, of laying down whatever is necessary for the supply of electric light. I should say that the Board of Trade have sanctioned overhead wires in this road. The urban district council, having regard to the incorporated sections of the Gasworks Clauses Act, 1847, are authorized to break up the road for the purpose of putting in standards and other works subject only to any prohibition to be found in that Act or in the Electric Lighting Acts. One of the incorporated sections of the Act of 1847 (which it is unnecessary to read in detail) says that the undertakers must not

C. A. 1911

ANDREWS v. ABERTILLERY URBAN COUNCIL.

Cozens-Hardy M.R.

interfere with or put anything on a building. It cannot be disputed that standard "C," placed as it is in the footings of the plaintiff's house, is so placed that it is impossible to justify it, and on that ground alone I think it is our absolute duty to grant a mandatory injunction ordering the removal of standard "C."

With regard to "A" and "B" the urban district council were entitled under the general provisions of the order to break up the road, and inasmuch as these standards have been erected in a part of the road which is repairable by the public, s. 13 of the Act of 1882 and s. 12, sub-s. 2, of the schedule to the Act of 1899 have no application to them, and I can see no objection to anything that the urban district council have done, unless it can be proved to the satisfaction of the Court that these standards are so high that to the extent of the upper part of them they go beyond the stratum of air which passed to the urban district council under the conveyance of December 12, 1898. There is no evidence which satisfies me that any part of these standards, which are either twenty-three or twenty-seven feet high (whether one or the other is left in some doubt), is beyond the reasonable area of user, beyond the reasonable height to which such standards may be erected. I can quite conceive that, if evidence had been given that the upper part of these standards was outside any reasonable limits of any area of user, it might have been our duty to grant an injunction, and to require the removal of that upper part, on the ground that it was a trespass upon that which was, in the view of the law, the land of the plaintiff, and not a portion of that stratum of the air which had been conveyed by him to the urban district council. Having regard to the fact that the portion of the road in which the standards were erected was repairable by the public, and to the absence of any evidence of the nature to which I have referred, I think it is impossible for us to interfere with standards "A" and "B."

As to standard "C" there is more difficulty. That question turns upon the construction of s. 13 of the Act of 1882 and s. 12, sub-s. 2, of the schedule to the Act of 1899. Sect. 13 of the Act of 1882 says in terms which are to my mind very strong and very clear, "Nothing in this Act or in any Act incorporated

therewith shall authorise or empower the undertakers to break up any street which is not repairable by such local authority." That is the prohibition. It is for any one who says that that prohibition does not apply to satisfy the Court that the subsequent words of the section avail him and take the case out of that prohibition. Then the section goes on, "or any railway or tramway, without the consent of the authority, company, or person by whom such street, railway, or tramway is repairable, unless in pursuance of special powers in that behalf inserted in the license, order, or special Act, or with the written consent of the Board of Trade." Warrington J. has taken the view that that section does not apply because there is no person by whom the street is repairable, and that therefore neither the prohibition nor the exception applies. In my opinion, with great respect to the learned judge, that is not the correct view. I think that the prohibition remains, and that there is nothing to enable the undertakers to escape from the exigency of the prohibition. But, if there is any doubt about that section, it seems to me the point is made still more clear by s. 12, sub-s. 2, of the schedule to the Act of 1899. That sub-section is very similar to s. 13 of the Act of 1882, but it is more explicit and clear. [His Lordship read the sub-section.] In my opinion, according to the true construction of s. 13 of the Act of 1882 and s. 12, sub-s. 2, of the schedule to the Act of 1899, it is not competent to the urban district council to break open the street at the point where standard "C" is fixed or any portion of that strip of the highway opposite the Royal Oak Hotel which is not repairable by the public and which is vested in the plaintiff.

In my opinion, therefore, we ought to grant a mandatory injunction to remove standard "C"; and also to declare that it is not competent to the urban district council to erect a standard or post in such part of the road opposite or adjacent to the Royal Oak Hotel as is not repairable by the public; the plaintiff to have the costs of the action and of the appeal.

BUCKLEY L.J. By the provisional order, s. 6, the undertakers are bound to lay down mains in certain streets of which Crumlin Road is one. Under s. 5 they are given authority to

C. A. 1911

ANDREWS v. ABERTILLERY URBAN COUNCIL.

Buckley L.J.

break up certain streets not repairable by the local authority of which Crumlin Road is not one. It results, therefore, that the undertakers are bound to provide mains in Crumlin Road, but that they have no statutory authority over the streets not repairable by the local authority other than that contained in the general statutes. With reference to standard "C" there is one point which may be dismissed in a very few words. In erecting standard "C," which consists of two posts braced together by struts, one post, which is adjacent to the building, is carried down below the soil, and the footings of the wall have been cut away in order to allow of its being let in. That is plainly a breach of s. 7 of the Gasworks Clauses Act, 1847. By s. 12, sub-s. 2, of the Electric Lighting Act, 1882, the sections of the Act of 1847 which relate to the breaking up of streets are made applicable to these undertakings, with the result that s. 6 gives certain powers to break up streets subject to the proviso in s. 7 which says that "nothing herein shall authorize or empower the undertakers to lay down or place any pipe or other works into, through, or against any building, or in any land, not dedicated to public use, without the consent of the owners and occupiers thereof." The undertakers have done that, and in that respect it is complained that they are wrong; in fact counsel for the respondents were not able to adduce any argument to the contrary. The other matter which arises with regard to standard "C" is this. We may take it that the portion of the street in which standard "C" is placed is not repairable by the local authority. The soil here is vested in the plaintiff. There is no question but that the user of the surface has been dedicated to the public and that it is a street; but it is a street not repairable by the local authority, and, as I have pointed out, the provisional order excludes this street from the operation of s. 5. In these circumstances the question is, what is the effect of s. 13 of the Act of 1882 and s. 12, sub-s. 2, of the schedule to the Act of 1899? I will take s. 13 of the Act of 1882 first. It begins thus: "Nothing in this Act or in any Act incorporated therewith shall authorise or empower the undertakers to break up any street which is not repairable by such local authority, or any railway or tramway."

The place where standard "C" is placed is within those words; it is a street and it is not repairable by the local authority, and, secondly, those words enact in plain terms that nothing in the Act authorizes the undertakers to break up that street. Then follow words which shew that under certain circumstances they may break up that street. But those plain words of veto coming at the outset of the section, it is in my opinion plain that those who are going to say that, notwithstanding that direct veto, they are going to break up the street must shew affirmatively that they have brought themselves within the subsequent words. The subsequent words are these: "without the consent of the authority, company, or person by whom such street, railway, or tramway is repairable, unless in pursuance of special powers in that behalf inserted in the license, order, or special Act, or with the written consent of the Board of Trade," and then follow provisions under which the Board of Trade is not to give its consent until notice has been given to such authority, company, or person, and an opportunity given to them to state their objections. The point taken is that there is no authority, company, or person by whom this bit of the street is repairable. It is not repairable by the local authority, there is no legal obligation upon the plaintiff as owner of the soil to repair, and it is said that, that being so, in some way or other—I confess I do not understand how—the direct words of the veto in that earlier part of the section are shewn to be qualified by the defendants having brought themselves within the following words. To my mind they must shew that they have obtained the consent of the company or person by whom the street is repairable, if there be such a person, or that they have obtained the consent of the Board of Trade if there be such a person and he refuses to consent. But if there be not such a person, there is nothing in those words to shew that the veto at the beginning of the clause is in any way qualified. If they cannot find a person responsible for the repairs, then the veto in the initial words of the section remains and there is nothing to empower them to break up this portion of the street which is not repairable. Sect. 12, sub-s. 2, of the schedule to the Act of 1899 is to my mind in all respects similar. It has

C. A. 1911

ANDREWS v. ABERTILLERY URBAN COUNCIL.

Buckley L.J.

transposed words which in the Act of 1882 appear in that connection "unless in pursuance of special orders in that behalf inserted in the license, order, or special Act" by putting them earlier in the clause. "Nothing in the special order shall authorise or empower the undertakers to break up or interfere with any street or part of a street not repairable by the local authority or any railway or tramway, except such streets, railways or tramways (if any), or such parts thereof, as they are specially authorised to break up by the special order." That is a mere transposition of these words, but the relevant words are as before "without the consent of the authority" and so on "or of the Board of Trade under section thirteen of the Electric Lighting Act, 1882." There are two alternatives. You can take either the one or the other. But to get the authority of the Board of Trade you are sent back to s. 13 of the Act of 1882. Here again it is for the persons who seek to shew that they are entitled to interfere with the street to prove that they are outside the words of veto at the commencement of the section by shewing that they have satisfied something in the enabling part of the section, and the local authority do not shew anything of the kind. In these circumstances it appears to me that this place where standard "C" is is not repairable by the local authority; it is excluded from s. 5 of the provisional order, and by these two sections of the Acts of 1882 and 1899 the local authority are forbidden to interfere with it. In my opinion, therefore, in this case the local authority are not entitled to do what they have done. I base my judgment upon two grounds: first, that they have put the standard in the footing of the wall, and, secondly, that they are not entitled to be there at all.

Standards "A" and "B" are in a different position. The first point is that the local authority are granted something or other under this conveyance of December 12, 1898. They are the grantees of that which the conveyance calls the surface. In popular language, where land is conveyed with a reservation of mines and minerals, the conveyance is often spoken of as a conveyance of the surface; but the expression is inaccurate. In those circumstances what has happened is that the purchaser has bought every stratum extending down to the centre of the

earth and extending up usque ad cœlum with the exception of the mineral strata. The purchaser of a stratum is in a different position. He is a purchaser of that stratum and of nothing more. The question is whether this conveyance does not mean a purchase of the latter kind. In my judgment it does. The conveyance recites that the purpose for which the purchasers are going to get the land is the widening of the highway. For the purpose of widening the highway all that they want will be the surface and a sufficient extension above and below to enable them to do repairs to the highway. Then the conveyance is of the surface of the piece of land, and then, not very accurately, I agree, it is to hold subject to the right of the owners and so on to the mines and minerals under that piece of land. On that conveyance I hold that all that was purchased was the stratum, and that that stratum was so much as was wanted for the purpose indicated in the recital, namely, widening the highway; that is, the surface with sufficient extension below the surface and above to allow the surface to be used for the purpose of a highway. That they have got, and it is not disputed here that the road is repairable by the local authority. One has not to consider again s. 13 of the Act of 1882 and s. 12 of the schedule to the Act of 1899; but there remains s. 7 of the Act of 1847. The argument upon that was that this section has forbidden the undertakers to place any work in any land not dedicated to public use. It has been settled by authority that the stratum of air lying above land passes with the land. Upon a purchase of the fee simple of the land the space usque ad cœlum passes with the conveyance. But the local authority, the purchasers in this case, have not acquired that. They have only acquired such stratum of air as is necessary for the enjoyment of the surface as a highway.

At a point (it is not necessary to say for the purposes of this case at what point) the interest and right of the local authority as purchasers of the surface in that space over the surface will cease. The dimensions of that space are such a space as is necessary for the proper and reasonable enjoyment of the surface for the purposes of the highway. There must be sufficient clearance for anything which would legitimately use the surface

C. A. 1911 ANDREWS v. ABERTILLERY URBAN COUNCIL. Buckley L.J.

as a highway. The height of a fire escape has sometimes been taken as the outside limit, but there is a limit somewhere or other. When that limit has been reached the local authority have no right to anything beyond that space and no right to put a work into that further space. It may be that the plaintiff could prove that these standards are of such a height that some portion of them is beyond the limit of space to which the local authority are entitled, but no evidence has been adduced to that effect. The evidence is such that I cannot say that the local authority have occupied some space that does not belong to them. In those circumstances, although it seems to me that there is a possible case under s. 7 of the Act of 1847, the plaintiff has not proved the facts necessary to make out that there is any trespass on the air in respect of any part of these standards, and as regards that part of the case he fails.

The learned judge in the Court below dismissed the action with costs. I think that we ought to allow this appeal and discharge that order, and grant a mandatory injunction in respect of standard "C," suspending it for a reasonable time to give the respondents an opportunity to appeal; and that there should be no further order except that the respondents do pay the costs of the action and the costs of this appeal. The Master of the Rolls suggests that there should be also a declaration, and I agree to that.

KENNEDY L.J. As regards standards "A" and "B" I entirely agree with what has been said by the Master of the Rolls and, if I followed it correctly, by Buckley L.J. in his concurrence with regard to the effect of the conveyance of December 12, 1898. I also agree that as regards standards "A" and "B" no case has been proved which would justify us in disturbing the decision of the Court below. As to whether or not the doctrine which has just been suggested with regard to there being a breach of s. 7 of the Gasworks Clauses Act, 1847, if it had been shewn that these standards were of a height beyond a certain unfixed stratum, and to my mind indiscernible stratum, I desire entirely to reserve my judgment. I have the gravest doubt whether "land" in that s. 7 has any reference to a stratum

of air above the surface of the ground or of the street or of the house, and, therefore, whether or not it can be said that putting up a pole thirty feet high is as to any part of it putting it on land not dedicated to the public. I do not desire to do more than indicate that I reserve my judgment with regard to that. Some day or other that question may have to be discussed with regard to aerial navigation, with which I think it would be a little more closely connected than it is with this question which we have now to consider. Therefore I pass away from "A" and "B."

With regard to "C," although I concur in the result which has been arrived at as regards the injunction, which is the substantial matter, I do not agree in the construction put upon s. 13 of the Electric Lighting Act of 1882 and s. 12, sub-s. 2, of the schedule to the Act of 1899, and as I have formed a clear opinion upon that point, I think I ought to state it. It seems to me that s. 13 is intelligible only upon one construction. No doubt in the first three lines of s. 13 of the Act of 1882 (and, as Buckley L.J. has pointed out, s. 12, sub-s. 2, of the schedule to the later Act refers expressly to that section) there is a statement that "nothing in this Act or in any Act incorporated therewith shall authorise or empower the undertakers to break up any street which is not repairable by such local authority, or any railway or tramway, without the consent of the authority, company, or person by whom such street, railway, or tramway is repairable." It is to be observed first of all that the section is not dealing with land generally, but with three specified things, a street, a railway, and a tramway, and that the undertakers mentioned in the section, who are in this case the local authority, include an independent company or any other person. As I read the section, it refers to a street which, though not repairable by such local authority, is a street which is repairable by somebody else whose consent has got to be given to its being broken up. It is clear that the word "repairable" means repairable as a legal duty, and the duty, of course, is by compulsion of law. Then the section goes on, "unless in pursuance of special powers in that behalf inserted in the license, order, or special Act" (I will leave that out) "or with the written consent of

C. A. 1911 ANDREWS v. ABERTILLERY URBAN COUNCIL. Kennedy L.J.

the Board of Trade" to be given with certain limitations. That is to say, if the street is not repairable by the local authority, then this Act does not empower the undertakers to break up that street if there is not in the second alternative the written consent of the Board of Trade. Now we come to that which I say to my mind compels only one interpretation: "and the Board of Trade shall not in any case . . . . give any such consent until notice has been given to such authority, company, or person by advertisement or otherwise." Therefore, unless there exists somebody by whom it is repairable, there can be no consent given. In other words, to my mind it follows as a logical consequence that the consent of the Board of Trade is to be given in the case in which the person to whom notice must be given, and who therefore must exist, has declined his consent. He is to have an opportunity of shewing the Board of Trade that he does not consent and giving his reasons for not consenting, of which the Board of Trade are to be the judges. He is to have an opportunity of stating any objections which he may have thereto. The construction which has been adopted by the other members of the Court, in my humble judgment, leaves out the key to the section, which is the existence of a person by whom the street is repairable and to whom notice must be sent, otherwise the last portion of the section seems to me to have no efficacy. In this case there is nobody by whom this portion of the street is repairable. There is no doubt that the land in the front of this Royal Oak Hotel is dedicated to the public as a highway. It is not repairable, it is said, by the local authority, and the evidence is that the repairs have been done by the plaintiff and his predecessor and not by the local authority. Therefore I take it that it was not repairable by the local authority. Then it is said that there is no duty on the plaintiff to repair, and if that is so, it seems to me to follow that the provisions of s. 13 of the Act of 1882 and the further provisions contained in s. 12, sub-s. 2, of the schedule to the Act of 1899 have no application to this case, because there was no consent which could be obtained, and these provisions do not apply except to a case in which there is somebody whose duty it is to repair; the real object of the section being, I presume, that if

the local authority do not have the duty of repairing the street cast upon them, then, if they are the undertakers, they must give notice to the person upon whom the duty is cast, and that, if that person objects to anything being done under these Acts or any Act incorporated therewith in the way of breaking up the street, they cannot get leave unless that person has been heard by the Board of Trade, and the Board of Trade, after hearing him, have given consent.

Although I do not read this section as it has been read by the Master of the Rolls and by Buckley L.J., the plaintiff is none the less in my opinion entitled to the injunction which he claims, because there is no doubt that these undertakers have actually driven one of their posts into the wall of his house. I cannot regard that, as has been suggested, as making a present of a piece of wood to the owner of the house. To my mind that is a most objectionable proceeding, which interferes with the house and property, and the plaintiff is entitled to a mandatory injunction to remove this standard. For that reason I concur in the judgment which has been given by my brothers.

Appeal allowed.

Solicitors: *Le Brasseur & Oakley, for Bowen & Son, Pontypool; Church, Adams & Prior, for A. H. Dolman, Abertillery.*

H. B. H.

WARRINGTON J.

1911

July 14, 15, 22.

STIRLING *v.* BURDETT.

[1910 S. 2488.]

Principal and Surety—Co-sureties—Contribution—Joint and Several Guarantee—Different Limits of Liability—Debt payable by Instalments—Payment of Instalment by one Co-surety—Right to Contribution—Proportion of whole Debt.

The plaintiffs and defendants executed a deed in May, 1907, whereby they jointly and severally guaranteed repayment of 15,000*l.* advanced on mortgage, interest thereon payable half-yearly, and premiums on a policy of insurance; and their respective liabilities were limited to maxima of various amounts. The 15,000*l.* was not to be called in for ten years. The plaintiffs had paid various sums for interest and premiums, and the amounts thus paid were more than their due proportion of the total of the interest and premiums paid, but not of the entire debt, and did not reach their respective limits:—

Held, that the 15,000*l.*, interest, and premiums constituted one debt; that, until the plaintiffs had paid more than their due proportion of the entire debt, they could not call on the defendants to contribute; and that it was immaterial that the plaintiffs had paid more than their share of the part which had become due.

Lawson v. *Wright* (1786) 1 Cox, 275, and *Ex parte Snowdon* (1881) 17 Ch. D. 44, explained.

The plaintiffs brought this action for a declaration that the defendants, as co-sureties with them, were jointly and severally liable to contribute to and make good a proper proportion of the calls made and all further calls, if any, to be made under a guarantee executed by them, rateably according to the respective limits provided for by the deed; accounts; and a declaration that the defendants were jointly and severally liable to pay to each of the plaintiffs their due proportion of various sums of money, which ought to have but had not been paid by each such defendant respectively.

The following statement of facts is taken from the judgment of Warrington J.:—

The contract of suretyship is contained in a deed dated May 22, 1907, made between the S. and K. Syndicate, Limited, called the mortgagors, of the first part, the plaintiffs and the defendants, called the sureties, of the second part, and the

Norwich Union Life Assurance Society, called the society, of the third part. By that deed, in consideration of the sum of 15,000*l.* paid to the mortgagors by the said society at the request of the sureties, "the mortgagors and the sureties hereby jointly and severally and also so as to separately bind every one two or more of them apart from the others or other of them but as to the sureties and each and every of them subject to the proviso limiting the amount of their respective liability under these presents hereinafter contained covenant with the said society to pay to the said society on the 22nd day of November next the sum of 15,000*l.* with interest thereon in the meantime from the date hereof at the rate of 6 per cent. per annum. And also so long after that day as any principal money shall remain due under this security to pay to the said society interest thereon at the same rate by equal half-yearly payments on every 22nd day of May and 22nd day of November." The deed contains an assignment in common form to the society of two policies of assurance specified in the schedule to the deed with a proviso of redemption, and then comes this further covenant, "And the mortgagors and the sureties hereby covenant and as separate covenants each of them hereby covenants with the said society but as to the sureties and each and every of them subject to the proviso limiting the amount of their respective liability under these presents hereinafter contained to pay all premiums or sums of money necessary for keeping such policies and every such substituted policy or policies as is hereinafter mentioned in full force and to make all such payments within seven days after the same shall from time to time become due respectively." There is a covenant not to do anything to avoid the policy, and the deed contains also this further provision, "And it is hereby declared that if the mortgagors or the sureties shall at any time make default in payment of any of the said premiums or other sums of which default the non-production to the said society by the mortgagors on demand of the receipt therefore shall be conclusive evidence it shall be lawful for but by no means obligatory upon the said society or those claiming under them respectively to pay any premiums or other sums which shall be or become due on any such policy or policies as

WARRINGTON J.
1911
STIRLING v. BURDETT.

aforesaid and all other expenses attending and keeping on foot the same respectively." In case of forfeiture they may effect new policies, and the mortgagors and sureties covenant to repay the premiums and interest thereon thus expended; and there is this further proviso, "Provided always and it is hereby further agreed between the said parties hereto that if the mortgagors or the sureties or any or either of them shall pay every half-yearly payment of interest on the half-yearly days hereinbefore appointed for payment thereof or within thirty days thereafter and shall also regularly pay the aforesaid premiums and other sums and shall perform all the covenants on the mortgagors' behalf herein contained (other than the covenant for payment of the said principal sum on the day aforesaid) and if the persons whose lives are assured by the said policies and the sureties shall all live until the 22nd day of May 1917 and if none of the sureties shall go to reside beyond the seas or become bankrupt or take the benefit of or become subject to the law relating to insolvents in any foreign country or compound with their respective creditors and if no resolution shall be passed or order made for the winding up of the mortgagors and no receiver be appointed of any of the mortgagors' property by any Court or mortgagee then the said society will not enforce payment of the whole or any part of the said principal sum until the 22nd day of May 1917 but in case there shall at any time be any default in any one of the above mentioned conditions then the whole of the said principal sum with interest thereon to the date of payment at the rate aforesaid shall immediately become due and may be recovered or raised as if this provision had not been herein contained and this notwithstanding any previous default may have been waived." I do not think I need read anything more until I come to the provision limiting the liability of the sureties: "Provided also that notwithstanding anything in these presents contained the sureties respectively shall not respectively be liable to pay in respect of the said principal sum of 15,000*l.* hereby secured and the interest thereon and the said premiums or otherwise by virtue of these presents any larger sums respectively than the sums set opposite their respective names in the second schedule hereunder written."

In the second schedule there is a list of the sureties, twelve in number, and against the names of each is placed the maximum sum for which they are respectively to be liable, and those sums vary very considerably; the largest is 5000*l.*, and the smallest is 1000*l.* The total amount of the maxima thus guaranteed is 30,000*l.*

The plaintiffs and two of the defendants have paid various amounts which have together been sufficient to cover the interest on the 15,000*l.*, and the premiums on the policies, down to a certain date, and the sums paid by the individual plaintiffs are more than their due proportion of the total of such interest and premiums, but do not in any case reach their respective limits. The period of ten years from the date of the deed has not expired, and no event has yet happened to free the society from the restrictions in the deed contained as to enforcing payment of the principal of the loan.

Cave, K.C., and *G. M. Simmonds*, for the plaintiffs. Where two or more persons join as sureties for a common principal, but bind themselves in different amounts, in the event of the principal being in default they are liable to contribute to the satisfaction of the creditor's claim in proportion to the limit of their respective liabilities and not in equal amounts: *Ellesmere Brewery Co.* v. *Cooper.* (1) We have paid too much, and the defendants ought now to pay their rateable proportion.

WARRINGTON J. The onus of proving their case appears to be on the defendants.

H. Terrell, K.C., and *Howard Wright*, for one of the defendants. Until the plaintiffs have paid more than their maximum liability under the guarantee they cannot call on us to contribute. The creditors might subsequently call upon us to pay up to our limit, and the fact that we had already paid something to the plaintiffs would be no answer to the claim. It makes no difference that the guarantee is for payment of various sums by instalments; it is all one debt: *Ex parte Gifford.* (2) As between themselves

(1) [1896] 1 Q. B. 75. (2) (1802) 6 Ves. 805

WARRINGTON J.
1911
STIRLING v. BURDETT.

sureties are not entitled to contribution until they have paid more than their proportion of what may possibly become due: *Davies* v. *Humphreys* (1); *Ex parte Snowdon* (2); *Wolmershausen* v. *Gullick* (3); *Lever* v. *Pearce*. (4) We cannot be made to pay more than we have contracted to guarantee.

Clauson, K.C., and *George Phillips*; *R. A. Gordon*; and *A. Neilson*, for the other defendants, supported the same contention.

Cave, K.C., in reply. We do not dispute the principle contended for by the defendants, but this is an exception to the rule. This is a guarantee of a number of separate debts, and the liability to contribute arises as soon as one of the instalments is paid: *In re Macdonald* (5), which is accepted as an authority in de Colyar's Law of Guarantees, 3rd ed. p. 344; Laws of England, by Lord Halsbury, vol. xv. p. 530; Rowlatt's Principal and Surety, p. 232; and Seton on Judgments, 6th ed. vol. iii. p. 2148. It depends on whether the whole of the debt which is actually due has been paid: *Lawson* v. *Wright*. (6) Here the principal is not due: *Craythorne* v. *Swinburne*. (7) The right to contribution arises as each separate debt becomes due. In all the cases cited by the defendants the surety who claimed contribution had paid less than his proportion of the sum actually due. Here we have paid all that is actually due.

Cur. adv. vult.

July 22. WARRINGTON J. This is an action by some of a number of co-sureties, as plaintiffs, against the rest of the co-sureties, as defendants, claiming contribution by the defendants to moneys paid by the plaintiffs under the contract of suretyship. The defendants say, and it is the fact, that the plaintiffs have not paid, or been called upon to pay, anything in excess of their proper proportion of the moneys which are the subject of the suretyship, and they insist that under those circumstances the plaintiffs are not in law entitled to the relief

(1) (1840) 6 M. & W. 153, 168.
(2) 17 Ch. D. 44; 50 L. J. (Ch.) 540; 29 W. R. 654; 44 L. T. 830.
(3) [1893] 2 Ch. 514.
(4) [1888] W. N. 105.
(5) [1888] W. N. 130.
(6) 1 Cox, 275.
(7) (1807) 14 Ves. 160, 165.

they ask. The plaintiffs reply that though they have not paid, or been called upon to pay, more than their proper proportion of the whole of the moneys covered by the contract, they have between them paid more than their proportion of what was actually due at the time of payment, and they insist that this fact entitles them to recover. [His Lordship stated the facts.]

The question then is, are the plaintiffs in law entitled now to contribution from the defendants? The fact that the ultimate liability of each surety is limited to a certain amount must be borne in mind. In the first place the liability to contribute as between the several sureties is in proportion to the amount for which they are respectively liable—*Ellesmere Brewery Co.* v. *Cooper* (1)—and not in equal shares. But, more than this, it is possible that if the co-sureties are now ordered to contribute to the payments of the plaintiffs they may ultimately be required to pay a larger sum than the amount of the limit because the payment to the co-sureties would be no answer to the claim of the society. This would not, of course, be the case if each were liable to the creditor for the whole debt. This circumstance renders the case, in my opinion, more favourable to the defendants than that of co-sureties each liable for the whole debt.

The law on the subject is thus stated by Baron Parke in *Davies* v. *Humphreys.* (2) Dealing with the question at what time the right of action for contribution arises, he says, "This right," that is, the right of one co-surety to sue the other for contribution, "is founded not originally upon contract, but upon a principle of equity, though it is now established to be the foundation of an action, as appears by the cases of *Cowell* v. *Edwards* (3) and *Craythorne* v. *Swinburne* (4); though Lord Eldon has, and not without reason, intimated some regret that the Courts of law have assumed a jurisdiction on this subject, on account of the difficulties in doing full justice between the parties. What then is the nature of the equity upon which the right of action depends? Is it that when one surety has paid any part of the debt, he shall have a right to call on his co-surety or co-sureties to bear a proportion of the burthen, or that,

(1) [1896] 1 Q. B. 75.
(2) 6 M. & W. 153, 168.
(3) (1800) 2 Bos. & P. 268.
(4) 14 Ves. 160.

WARRINGTON J.
1911
STIRLING v. BURDETT.

when he has paid more than his share, he shall have a right to be reimbursed whatever he has paid beyond it? or must the whole of the debt be paid by him or some one liable, before he has a right to sue for contribution at all? We are not without authority on this subject, and it is in favour of the second of these propositions. Lord Eldon, in the case of *Ex parte Gifford* (1), states, that sureties stand with regard to each other in a relation which gives rise to this right amongst others, that if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion which, in all events, he is to pay: and he expressly says, 'that unless one surety should pay more than his moiety, he would not pay enough to bring an assumpsit against the other.' And this appears to us to be very reasonable: for, if a surety pays a part of the debt only, and less than his moiety, he cannot be entitled to call on his co-surety, who might himself subsequently pay an equal or greater portion of the debt; in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would have one to receive. In truth, therefore, until the one has paid more than his proportion, either of the whole debt, or of that part of the debt which remains unpaid by the principal, it is not clear that he ever will be entitled to demand anything from the other: and before that, he has no equity to receive a contribution, and consequently no right of action, which is founded on the equity to receive it." The same principle was adopted in *Ex parte Snowdon* (2), about which I shall have something to say later.

It is contended, however, that where the co-surety has paid more than his proportion of what is actually due at the time of payment he may at once claim contribution, though there remain unpaid other moneys covered by the contract of guarantee, and, accordingly, that inasmuch as in this case nothing had become payable except the premiums and interest paid by the plaintiffs, they are entitled to immediate contribution. The supposed authority for the plaintiffs' contention consists of the case of *Lawson* v. *Wright* (3), and the remarks on that case

(1) 6 Ves. 805.
(2) 17 Ch. D. 44.
(3) 1 Cox, 275.

attributed to Cotton L.J. in *Ex parte Snowdon* as variously reported in the *Law Reports*, 17 Chancery Division, p. 49, and in the other reports of the same case in 50 *Law Journal* (Chancery) at p. 542 and in 29 *Weekly Reporter* at p. 654, and a note in the *Weekly Notes* of 1888 at p. 130 of the case of *In re Macdonald*.

In *Ex parte Snowdon* (1), a surety who had paid part only of the debt, such part not exceeding his due proportion, was claiming contribution from his co-surety, and *Lawson* v. *Wright* (2) was there cited as an instance of a case in which a co-surety was entitled to contribution though he had only paid a part of the debt. Cotton L.J. is reported in the *Law Reports* to have said this (3): "What we have to decide is, whether a surety who has only paid his proportion of the debt for which he is liable can present a bankruptcy petition against his co-surety for contribution. In my opinion he cannot." Then the report goes on: "To entitle him to contribution it is not necessary that he should pay more than his proportion of the sum secured by the bond." That is an obvious mistake in the report; the whole context of the judgment shews the word "not" ought to be omitted. "To entitle him to contribution it is necessary that he should pay more than his proportion of the sum secured by the bond by which he became surety, with a limitation as to the amount of his liability. If he has paid more than his proportion (in a case where there are two sureties, more than a moiety, of the debt due), then he can call upon his co-surety for contribution, although the amount may be nothing like the amount of the debt due by the principal debtor. Here the surety has been called upon to pay half the amount due under the bond, and if he has only paid his half, I cannot see how he can require contribution from his co-surety, who is equally liable to pay the other half of the debt to the creditor. Under such circumstances I cannot see that any equity can arise against the co-surety, and in this case, in my opinion, no equity does arise against the co-surety while the creditor can still call upon him for the other half of the principal debt. None of the cases which have been cited conflict with this." Then come the

(1) 17 Ch. D. 44.
(2) 1 Cox, 275.
(3) 17 Ch. D. 48.

WARRINGTON J.
1911
STIRLING v. BURDETT.

remarks about *Lawson* v. *Wright*. (1) "In *Lawson* v. *Wright* (1), the co-sureties had guaranteed a liability of 320*l*., and the only sum due by the debtor at the time of payment was 100*l*." The importance of that sentence consists in the words "at the time of payment." "The plaintiff claimed contribution from his co-surety, but he had paid more than his proportion of the only debt which was due to the creditor, and for which he had agreed to become surety"—I think "due" there means due at the time of payment, having regard to the previous sentence—"and for which he had agreed to become surety. Therefore it was held that he could in equity claim contribution, because he had paid more than his just proportion of the debt due."

In the report in 50 *Law Journal* (Chancery), at p. 542, Cotton L.J. is represented as using different expressions. I need not read the whole of his judgment; I will only read that part that refers to *Lawson* v. *Wright* (1): "In the case of *Lawson* v. *Wright* (1) the co-surety guaranteed a liability of 320*l*. when the only sum due by the debtor was 100*l*., and the surety claimed contribution." The importance of that will be observed at once. The learned judge there is made to omit the words "at the time of payment" and says "the only sum due by the debtor was 100*l*., and the surety claimed contribution; but in that case he had paid more than his proportion of the debt," not of the debt then due, but of the debt. "In this case, in my opinion no equity can arise against the co-surety while the creditor can still call upon him for his proportion of the principal debt."

His words are again reported in slightly different terms in 29 *Weekly Reporter*, at p. 654. There he is made to say this: "In one case which was cited, of *Lawson* v. *Wright* (1), the co-surety guaranteed a liability of 320*l*. when the only sum due by the debtor was 100*l*., and the co-surety claimed contribution. But in that case the plaintiff had paid more than his proportion of the debt actually due and for which he had agreed to become security; and it was held therefore that there was a debt due by the co-surety for his share."

From the report in the *Law Reports* the inference has been drawn that the learned Lord Justice thought *Lawson* v. *Wright* (1)

(1) 1 Cox, 275.

to be an authority for the proposition that if one co-surety paid more than his proportion of what was due at the date of payment he might have contribution though he had not paid more than his proportion of the entire debt.

The report of *Lawson* v. *Wright* (1) is somewhat obscure. The facts are thus stated: "The tolls of a turnpike gate having been put up to sale, George Watson became the purchaser, and upon that occasion agreed with the commissioners to pay a sum of 320*l.*, by instalments of 20*l.* each, at times specified in the cause; and Thomas Wright and George Wright became jointly and severally bound with the said George Watson for such payments at the expiration of the time within which the instalments were to be paid. George Watson was a defaulter for 100*l.* whereupon a bond was put in suit against Thomas Wright, and he actually paid the money, after which the said Thomas Wright being dead, the present bill was filed by his executors against George Wright the co-surety, and the said George Watson, the principal, stating George Watson to be insolvent, and praying a contribution from the said George Wright, but praying no relief against Watson." Now it will be observed that the report there states that George Watson was a defaulter for 100*l.* whereupon the bond was put in suit against Thomas Wright. Of course it is quite possible on those words to infer that the bond was put in suit at the moment that the several sums of 20*l.*, of which George Watson had made default, had become due, but it will be seen that is not the case.

I have examined in the registrar's book for the year 1786 the record of the judgment in *Lawson* v. *Wright* (1), which fortunately at that date sets out the bill and answer, and the other proceedings in the suit, and I find that in fact the 100*l.* mentioned in the report was the whole of the money which was or could become due under the contract guaranteed by the co-sureties. The case is, therefore, not an authority for the proposition put forward by the plaintiffs. As to the remarks of Cotton L.J., it is contended that they indicate his view of what the law would be in a case such as he supposed *Lawson* v. *Wright* (1) to have been, and that the view thus indicated is in the plaintiffs' favour. But

(1) 1 Cox, 275.

WARRINGTON J.
1911
STIRLING v. BURDETT.

in the first place, having regard to the various reports, I cannot be sure of what the learned Lord Justice said, and, in the second place, his words, even as reported in the *Law Reports*, which are by far the strongest in the plaintiffs' favour, are nothing more than a suggestion that payment of all that is due at the time might justify a claim for contribution. They do not involve a decision on the point, nor, I think, even a definite expression of opinion in favour of such a proposition.

But the plaintiffs rely in addition on *In re Macdonald.* (1) In reference to this de Colyar's Law of Guarantees, 3rd ed., has the following passage at p. 344. Having stated the law as expressed in *Davies* v. *Humphreys* (2) and *Ex parte Snowdon* (3) very much in the terms in which I have already mentioned it, the learned author goes on thus: "Where, however, a debt guaranteed is payable by instalments, a surety who has paid the whole of one instalment is, semble, entitled to recover contribution from his co-surety in respect of such payment." And he cites in support of that *In re Macdonald* (1) and *Lawson* v. *Wright.* (4)

In the Laws of England, by Lord Halsbury, vol. xv. p. 530, the same learned writer, Mr. de Colyar, makes practically the same statement.

The note in the *Weekly Notes* is as follows: "Appeal from the refusal of Mr. Registrar Hazlitt to make a receiving order against James Macdonald. Macdonald, and Peter Grant, as sureties for W. D. Gordon, gave to the Commercial Bank of Scotland a joint and several promissory note for 400*l.* The debt was payable in three equal instalments. The first instalment of 133*l.* 6*s.* 8*d.* was not paid by the principal debtor when it became due, and Grant was compelled to pay it to the bank. Grant then brought an action against Macdonald for 66*l.* 13*s.* 4*d.* (half of the 133*l.* 6*s.* 8*d.*) and recovered judgment for that sum and 7*l.* 10*s.* costs. He served a bankruptcy notice on Macdonald in respect of the judgment debt, and Macdonald failed to comply with the notice. Grant then presented a bankruptcy petition against Macdonald. The registrar was of opinion that all the requisites for the making of a receiving order were proved, but upon the

(1) [1888] W. N. 130.
(2) 6 M. & W. 153.
(3) 17 Ch. D. 44.
(4) 1 Cox, 275.

evidence he thought that he ought, in the exercise of the discretion given by section 7 (3.) of the Bankruptcy Act, 1883, to refuse to make the order, and he accordingly dismissed the petition. Grant appealed," and the Court allowed the appeal. The note states, "Lord Esher M.R. said that the meaning of the promissory note was, that, as between themselves, the two sureties would pay each instalment of the debt, if the principal debtor did not. If one of the sureties paid an instalment, he was immediately entitled to contribution from the other. The evidence did not shew any 'sufficient cause' for refusing to make a receiving order. Lords Justices Lindley and Lopes concurred on other grounds, without referring to the question of the surety's right to contribution." The report is, of course, most imperfect, but I should gather that Lord Esher regarded the instalments in that case as separate debts, and based his judgment on that view.

I have been furnished with a copy of the note, the writ and the judgment in the action on which the bankruptcy petition was founded. That was the action of *Grant* v. *Macdonald*. The note was in these terms: "At six, twelve, and eighteen months after date by equal instalments we Peter Grant, William and Duncan Gordon, James Macdonald and William Gordon conjointly and severally promise to pay to the Commercial Bank of Scotland, Limited or order within their office in Elgin the sum of 400*l.* sterling for value received." The writ was for 66*l.* 13*s.* 4*d.*, and the particulars are as follows: "of the amount paid by the plaintiff to the Commercial Bank of Scotland, Limited, at the request of the defendants being the first of three equal instalments due to them on promissory note for 400*l.* upon which the defendant was and is jointly liable with the plaintiff, 133*l.* 6*s.* 8*d.* Deduct one moiety, the plaintiff liable to pay as his proportion 66*l.* 13*s.* 4*d.* Balance due from the defendant 66*l.* 13*s.* 4*d.*" Then the plaintiff got leave to sign judgment, and judgment was entered for the plaintiff for 66*l.* 13*s.* 4*d.* and costs. The form of the note confirms me in the view I have expressed as to the real ground of the judgment of Lord Esher. I should hesitate to accept a note in the *Weekly Notes* as a binding authority, even in a case much more like that reported than is the present one.

WARRINGTON J.
1911
STIRLING v. BURDETT.

Here, in my opinion, the contract is indivisible, and the limitation of liability would make it impossible with justice to deal with individual payments in the way contended for by the plaintiffs, and I think that the defendants are right on the point of law raised by them. The result is that as regards the defendants who have specially raised the point the action must be dismissed with costs.

Solicitors: *H. E. Warner & Co.; Morley, Shirreff & Co.; J. S. Phillips; Geo. D. Perks; Ray, Flower-Ellis & Simon.*

H. C. R.

NEVILLE J.
1911
June 20, 21.

In re SLY, SPINK & CO.

[00184 of 1909.]

Company—Practice—Rectification of Register on Application of Company—Allotment—Minimum Number of Directors—Quorum—Power for Continuing Directors to act—Minimum Number never appointed—Allotment by Quorum being less than Minimum Number—Invalidity—Estoppel.

The articles of association of a company provided that the number of directors should not be less than four or more than eight; that the two vendors should be the first directors; that the first directors should have power before the first general meeting to appoint additional directors but so that the number should not exceed seven; that continuing directors might act notwithstanding any vacancy; that three directors should be a quorum. The two first directors appointed a third, and the three held board meetings and allotted shares, including 2000 shares which were allotted as fully paid by way of commission to M., the promoter of the company. M. had transferred some of his shares to H., the solicitor of the company, partly as a gift and partly in payment of his costs, and others to bona fide purchasers. The company never really commenced business and was ordered to be wound up compulsorily on the petition of shareholders. The vendors, who had acted honestly, paid all the debts of the company and repaid the "bona fide" shareholders what they had paid, taking transfers of their shares. The liquidator took out a summons in the name of the company to rectify the register by striking off the names of M. and H. M. and H. had full notice and knowledge of the articles and the circumstances, but the effect of striking off their names would be to leave the vendors the only shareholders of the company and enable them to take back their property:—

Held, that, there never having been a properly constituted board of directors, the allotments made by the three directors could not be

justified either because they were a quorum or because they were continuing directors; that the original allotment to M. was bad, and nothing in the circumstances estopped the company from applying to rectify the register, and the names of M. and H. must be removed.

THESE were two summonses in a winding-up by the company for the rectification of the register of the company by the removal therefrom of the names of David Macdonald as the holder of 1227 fully-paid shares and of Warren Eccles Hertslet as the holder of 375 fully-paid shares respectively. The summonses were heard together.

Frederick Spink and George William Sly were in the year 1907 carrying on separate businesses as butchers, which they were desirous of selling, and were introduced to Macdonald, who persuaded them that the best plan would be to sell to a company. Accordingly on December 20, 1907, an agreement drawn up by Hertslet, a solicitor introduced by Macdonald, on behalf of both parties, was entered into between Spink and Sly of the one part and Macdonald of the other part, by which, after reciting that Spink and Sly had asked Macdonald to promote a company to purchase their businesses and that the nominal capital of the company was to be 25,000*l.* divided into 6000 6½ per cent. preference shares and 19,000 ordinary shares of 1*l.* each, it was agreed among other things (1.) that Spink and Sly should sell and the company when formed should purchase the businesses of Spink and Sly for 22,100*l.*, to be paid as to 10,000*l.* in cash or shares at the vendors' discretion, of which 5050*l.* was to be paid to Sly and 4950*l.* to Spink, and the residue in fully-paid ordinary shares, 6100 to be issued to Sly and 6000 to Spink.

(2.) That Macdonald would circulate the prospectus, a copy of which was attached to the agreement, and use his best endeavours to induce the public to apply for shares.

(3.) That Spink and Sly should provide in equal shares 400*l.* for preliminary expenses.

(4.) That on the company going to allotment Macdonald should be entitled to 2000 fully-paid shares, but that he should lose all claim to such shares if the company did not proceed to allotment before March 20, 1908.

(6.) That Macdonald should be entitled, if he thought it desirable,

NEVILLE J. 1911 SLY, SPINK & CO., *In re.*

to have all or part of the share capital underwritten, and Spink and Sly should pay in equal shares a sum equal to 5 per cent. on the amount of such underwriting.

(7.) That Macdonald should have the right to nominate one director to sit on the board with the vendors, and one other director to be nominated by them jointly.

In pursuance of this agreement the company was incorporated on February 6, 1908.

By article 5 of the articles of association the minimum subscription on which the directors might proceed to allotment was fixed at 4000 shares to be paid for in cash.

The provisions of the articles of association as to directors were as follows:

"79. The number of directors shall not be less than four or more than eight.

"80. The following persons shall be the first directors of the company:—George William Sly and Frederick Spink, who shall each be a life director, so long as he is the sole holder in his own right of shares or stock of the company to the nominal value of not less than 3000*l.*

"81. The directors shall have power to appoint any other persons to be directors at any time before the ordinary general meeting to be held in the year 1908, but so that the total number of directors shall not exceed the maximum hereinbefore prescribed."

"88. The continuing directors may act notwithstanding any vacancy in their body, but if and so long as the number of directors is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose."

"109. The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. Until otherwise determined three directors shall constitute a quorum."

A prospectus was issued, and on February 13, 1908, the time

given for subscription having closed, Sly and Spink had a meeting with Macdonald, when he told them that only about 1000 shares had been applied for and no shares had been underwritten, though they had paid him 165*l.* for underwriting commission. On Macdonald's suggestion Sly and Spink then applied for 3000 shares, and on the next day Sly and Spink and Bonser, a director nominated by them, proceeded to allotment as directors, though some of the allotment money was not paid. No other director was ever appointed.

After Bonser's election the three directors appointed Hertslet solicitor, and Brown, a clerk of Macdonald's, secretary of the company.

On March 2, 1908, an agreement adopting the sale and purchase agreement was sealed. On March 11, 1908, certain resolutions were passed on the suggestion of Hertslet, the result of which was that Sly and Spink agreed to accept 1250*l.* in cash and 12,100 shares and to make over their businesses, and the three directors purported to allot 12,100 shares, including 2000 allotted to Macdonald. On September 7, 1908, an assignment of the businesses to the company was executed. Afterwards the nominees of Sly and Spink repudiated their shares, and Sly and Spink repudiated the agreement for sale and resumed possession of their businesses.

On May 25, 1909, the company was ordered to be wound up compulsorily on the petition of shareholders who had signed the memorandum of association.

Before that time Macdonald had transferred 375 of the fully-paid shares allotted to him to Hertslet and 398 to other transferees who were believed to be bona fide purchasers without notice of the irregularities in allotment. Sly and Spink then paid all the creditors of the company and paid the bona fide shareholders, including the transferees of Macdonald other than Hertslet, the amounts paid up by them on their shares, taking transfers of the shares to themselves.

The effect of striking Macdonald and Hertslet off the register would be to leave Sly and Spink the only shareholders in the company.

Hertslet was present at every meeting and prepared all the

NEVILLE J. 1911 SLY, SPINK & CO., *In re.*

documents. It was impossible to deny that he had notice of the articles and full knowledge of the breaches of them. It was contended that no knowledge was brought home to Macdonald, but the judge held on the evidence that he had full knowledge of everything which was done.

Hon. Frank Russell, K.C., and *Howard Wright*, for both the summonses. The direction in article 79 that the directors shall not be less than four is imperative and cannot be got over by the provision that three directors shall be a quorum. *In re Alma Spinning Co.* (1) and *In re British Empire Match Co.* (2) are clear authorities on both those points. It is contended that article 88 applies, but "continuing directors" means those who continue when one or more directors out of a number originally sufficient have ceased to be directors: the words "notwithstanding any vacancy" make any other construction impossible. Macdonald clearly knew all about the articles and cannot plead want of notice. Hertslet is in the same case; he acted as solicitor for the company, prepared the articles, and had full notice of all the facts: *In re General Provident Assurance Co.* (3)

Gore-Browne, K.C., and *E. G. Palmer*, for Hertslet. The question before the Court is merely the meaning of the articles taken together. Article 80 nominates Sly and Spink as the first directors of the company, and it is a necessary inference that they could act. They appointed one more director under article 81 and then had the requisite quorum, and could act either under the power inferred from their appointment as first directors or under article 88. The plain meaning of continuing directors is those who continue in office, not those who continue when others retire. It was held in *In re Scottish Petroleum Co.* (4) that in spite of a provision that there should not be less than four directors a quorum of two could act even when there were not four directors existing. If the allotment to Macdonald was bad the allotments to Sly and Spink were bad also; the liquidator does not seek to set aside those allotments or the agreement with Sly and Spink. If this application succeeds they

(1) (1880) 16 Ch. D. 681.
(2) (1888) 59 L. T. 291.
(3) (1868) 38 L. J. (Ch.) 320.
(4) (1883) 23 Ch. D. 413, 431.

will retain their businesses and the shares too. The liquidator can only stand in the shoes of the company, and the company are estopped from disputing the allotments: *Faure Electric Accumulator Co.* v. *Phillipart* (1); *York Tramways Co.* v. *Willows.* (2) The Court will not alter the register after a winding-up unless the applicant has an equity in his favour: *Trevor* v. *Whitworth.* (3)

G. W. H. Jones, for Macdonald.

Hon. Frank Russell, K.C., in reply. If the parties have a legal right to rectification the Court will not go into the question of equities: *Bellerby* v. *Rowland & Marwood's Steamship Co.* (4)

NEVILLE J. In this case the circumstances are somewhat peculiar. The application by the company is an application which will enure to the benefit of Messrs. Sly and Spink, who are shareholders in the company and were vendors to the company, and I was anxious to see whether there was any possibility of making out a case that, apart from the legal rights of the parties, there was either estoppel or some equity which could be relied upon as justifying the Court in refusing to give effect to them. Having considered the matter carefully from every point of view and having been assisted by able argument, I am quite unable to see that there is anything which can justify me in refusing the relief which is asked for by the applicants if I find that the allotment was in fact invalid, having regard to the facts which are either admitted or have been held by me, and the provisions of the articles of association by which the company was regulated.

The question was this: whether a board of three could under the regulations of this society legally allot shares. If they could not, then the shares were illegally allotted, because there never was a board consisting of more than three. Certain difficulty arises in the construction of the articles of association in this way. Under the head of "Directors" article 79 provides that "The number of directors shall not be less than four or more than eight." It is not said, as it is in some cases, that the number of directors

(1) (1888) 58 L. T. 525.
(2) (1882) 8 Q. B. D. 685.
(3) (1887) 12 App. Cas. 409, 440.
(4) [1902] 2 Ch. 14.

NEVILLE J. 1911 SLY, SPINK & Co., *In re.*

shall be twelve or any fixed number; but it gives the minimum number of directors which can constitute a board, and that minimum is four. Below that number you cannot have any board at all. Then follows article 80, which is to this effect: "The following persons shall be the first directors of the company," and then Messrs. Sly and Spink are named. Each is to be a life director so long as he holds the qualification. I think that where articles declare that such and such persons shall be the first directors of the company, if that stands alone, it is necessarily implied that they shall be persons who are competent and authorized to carry on the business of the company. But I have to reconcile articles 80 and 81 and read them in connection with article 79. I take article 79 to be imperative that the board of directors shall not be less than four, and although the first directors are named, consisting only of two persons, yet by article 81 they are given the power to appoint any other persons to be directors. Consequently it is open to them to constitute a legal board immediately upon their appointment, because they can there and then appoint two persons who would make up the board to four, the requisite number. It seems to me that inasmuch as I can give a construction to those articles which will give effect to all of them, it is impossible for me to disregard article 79 and say that the words "The following persons shall be the first directors" (which taken without their context would mean that those persons could conduct the business of the company) are still to have that meaning in connection with articles 79 and 81, although the first directors are two persons only and the board would not then consist of the requisite number of four. I come to the conclusion, therefore, that there must be a board of directors consisting of four.

Now, although you have to have a board of four, yet under a subsequent article the quorum which could act, as provided by article 109, was three, and inasmuch as there were three directors in the present case it was said that they had a quorum at all events and therefore were able to transact business. It is quite clear to my mind that the provision that a quorum of the board of four may act does not make legitimate acts by a board consisting of less than four members: you must have a board of four before

there can be a quorum. Saying that the quorum shall be three seems to me to be quite a different thing from saying that three directors can act as a board when the articles themselves provide that the number of directors shall be not less than four.

That leaves only one other point of construction, and that is under article 88, whether in the circumstances that article can apply. Now, here there never were more than three directors, and from the time of appointment of Mr. Bonser there never were less than three directors appointed under the articles. Messrs. Spink and Sly, either themselves or in conjunction with Mr. Macdonald, appointed Mr. Bonser to act as a third director, and those three directors were the directors who acted in the business of the company from the first.

But it is said that they were continuing directors because they had not ceased to be directors. I do not think that is a reasonable interpretation to put upon the words contained in the articles. The expression is a familiar one and it applies to cases where the number of the original board has been reduced by death or otherwise, and in such cases those who are left, subject to the provisions of article 88, would be entitled to conduct the business of the company. With regard to that I think the two cases which were cited—*In re Scottish Petroleum Co.* (1) and *In re British Empire Match Co.* (2)—shew very clearly the distinction between the cases where directors too few in number can and cannot act as continuing directors. In one case you have a board insufficient in number from the first, and notwithstanding the continuing clause it was held that the board could not transact business. In the other case you have a board which was originally competent to transact business but was diminished by retirement to a number less than that provided for by the articles. The continuing clause was held to apply and those directors were held to be competent to transact the business of the company.

I hold that the allotments, which as I have already held were made under circumstances which were fully known both to Mr. Macdonald and to Mr. Hertslet, were invalid, inasmuch as the allotments purported to be made by a board of

(1) 23 Ch. D. 413. (2) 59 L. T. 291.

NEVILLE J. 1911 SLY, SPINK & Co., *In re.*

three and the regulations of the company provided for a board of not less than four. I think, therefore, that the present applications must succeed, and the register must be rectified by striking Messrs. Macdonald and Hertslet off the register of shareholders of the company.

Solicitors: *Tippetts; Lawrence Jones & Co.; Windsor & Co.*

J. R. B.

NEVILLE J. 1911 *June* 28.

In re GRAHAM-WIGAN.

[1911 G. 579.]

Practice—Costs—Extraordinary Tithe Redemption Act, 1886 (49 & 50 *Vict. c.* 54), *s.* 5, *sub-s.* 4—*Compulsory Redemption—Payment into Court—Application for Investment.*

The Dean and Chapter of Canterbury Cathedral were the owners of extraordinary tithe charged on the lands of W. W. applied to the Board of Agriculture for compulsory redemption, and under their direction paid the assessed amount of redemption money into Court. The Dean and Chapter applied by summons for investment of the redemption money. The Extraordinary Tithe Redemption Act provides that the money may be dealt with as if it were money paid in under the Tithe Commutation Acts. None of these Acts contain any direction as to costs:—

Held, that the Court had jurisdiction to deal with the costs, and they must be paid by W., the landowner seeking compulsory redemption.

THE Dean and Chapter of the Cathedral Church of Canterbury were the owners of the extraordinary tithe charged upon a farm called Oakwood in the parish of Maidstone. On March 21, 1911, Wigan, the owner of the farm, in pursuance of s. 5, sub-ss. 1 and 4 of the Extraordinary Tithe Redemption Act, 1886, and of a warrant of the Board of Agriculture and Fisheries, paid the sum of 481*l.*, being the certified capital value of the tithe rent-charge, into Court to the credit of "Ex parte the Extraordinary Tithe Redemption Act, 1886. In the matter of John Alfred Wigan of Oakwood Park Maidstone in the county of Kent landowner and the Dean and Chapter of the Cathedral Church of Canterbury tithe owners."

The Dean and Chapter took out this summons asking for the

investment of the money in Newfoundland 3½ per cent. Inscribed stock and payment of dividends to them, and that the costs of and incidental to and consequent upon the application might be paid by Wigan. The summons was not opposed except upon the question of costs; but, as the Master was ready to order the landowner to pay the costs, the summons was adjourned into Court to be argued on that question. The title of the account is prescribed by the Act. (1)

E. F. Ball, for the Dean and Chapter. The Extraordinary Tithe Redemption Act of 1886 provides for the assessment by the Land Commissioners, whose powers are now vested in the Board of Agriculture, of the capital value of all extraordinary tithe, and s. 5 provides for the redemption of extraordinary tithe by payment to the tithe owner in certain cases, and then by sub-s. 4 enacts that in any other case the owner of the land may pay the value of the extraordinary charge into the Bank of England, and the money so paid shall be applicable to the like purposes and may be dealt with in like manner as if it were money paid into the Bank under the Tithe Commutation Acts. None of these Acts contain any power for the Court to order the payment of costs. Originally, therefore, there was no jurisdiction to order costs. Sir George Jessel M.R. held in *Ex parte Mercers' Co.* (2) that Order LV. of the Rules of 1875, which is identical with Order LXV., r. 1, of the present Rules, gave jurisdiction to the Court to deal with the costs in such cases, and his decision was followed by North J. in *In re Lee & Hemingway* (3), but those cases were overruled by

(1) Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), s. 5:

"(1.) The owner of or any person interested in any land subject either to an extraordinary charge or to a rent-charge substituted therefor under this Act may at any time redeem the charge in manner by this section provided."

"(4.) In any other case the owner of or any person interested in the land may pay the amount of the capital value of the extraordinary charge into the Bank of England, to be placed to the account of the Paymaster-General, in the matter of the landowner and the tithe owner (naming them), and in the matter of this Act; and the money so paid shall be applicable to the like purposes and may be dealt with in like manner as if it were money paid into the Bank under the Tithe Commutation Acts."

(2) (1879) 10 Ch. D. 481.

(3) (1883) 24 Ch. D. 669.

NEVILLE J. 1911 GRAHAM-WIGAN, *In re.*

the Court of Appeal in *In re Mills' Estate.* (1) The power was clearly given to the Court by the Judicature Act, 1890, s. 5: see *In re Fisher* (2); *In re Wrexham, Mold and Connah's Quay Ry. Co.* (3); *Dartford Brewery Co.* v. *Moseley.* (4) There is no doubt about the jurisdiction, and Kay L.J. in *In re Fisher* (2) says: "If we look at the reason of the thing, it is very hard upon a landowner that his land should be taken from him compulsorily and the money paid into Court, and that when the money is paid out he should have to pay the costs of it himself." Those remarks apply to this case. It is only when the landlord wilfully refuses to convey or deliver up possession as in *In re Schmarr* (5) that the Court orders the landowner to pay costs.

Harman, for the landowner. I do not dispute the jurisdiction. But the Court has a discretion and will exercise it according to what appears to be the intention of the Legislature in the special Act before it. This statute expressly provides (s. 10) that the expenses incurred by the Commissioners in carrying out the assessment shall be borne by the landowners, but there is no such provision for expenses of redemption. The policy of the Act is that so soon as the certificate is given by the Board the land should be free of the burden of extraordinary tithe. The analogy of cases where land is taken compulsorily by a company for its own profit does not apply. The case is much more like the enfranchisement of copyholds. Under the Enfranchisement Acts a summons of this kind is never served upon a landowner, and there was no need to serve the landowner here. Under the Act of 1846 the money was paid into an account ex parte the Tithe Commissioners, and the same practice was followed under the Copyhold Act of 1894. This Act was passed for the relief of landowners by making the redemption of extraordinary tithe easy; the Court will not make it more difficult by throwing the costs on the landowner.

NEVILLE J. In this case I have to determine whether the costs of an application for the investment of money paid into Court

(1) (1886) 34 Ch. D. 24.
(2) [1894] 1 Ch. 53, 450, 453.
(3) [1900] 1 Ch. 261.
(4) [1906] 1 K. B. 462, 464.
(5) [1902] 1 Ch. 326.

for the redemption of extraordinary tithe rent-charge belonging to an owner under disability ought to be borne by the owner of the tithe or the owner of the land. It is quite clear that the costs are in the discretion of the Court. But so far as I can see there is no authority on the question how the discretion is to be exercised in the absence of any express provision in the particular statute before the Court. It is very desirable that the discretion should be exercised with uniformity. I do not, however, get much assistance either from the different Acts passed by the Legislature or from the decided cases. In some cases the Legislature has thought fit to impose the costs on the persons by whom the statutory powers are exercised, and in others upon the persons against whom they are exercised. Nor is there any clear general principle to be found in the decided cases. I have therefore to consider what the general intention of the Legislature is. I should have thought on principle that, where powers are given to a person to take property from another compulsorily, the Legislature would have intended to protect the person against whom the compulsory powers were exercised as far as possible. If this were not so in the case of the present statute, the burden of costs would fall upon the tithe owner who happened to be under any disability every time any tithe was redeemed, and having regard to the fact that the sums payable on redemption of tithe are often very small, the burden so imposed on the tithe owner might be very great. It seems to me that the person exercising the compulsory powers should bear the burden of the costs incurred. I hold, therefore, that in a case like the present, of an application for the investment of money paid into Court in redemption of compulsory tithe, the costs ought to be paid by the landowner as the person who is exercising compulsory powers.

It is curious that there is no reported decision on the point. It is clearly a case in which a definite rule ought to be established, and though it is extremely hard on the parties that so small a matter should be taken to the Court of Appeal, I should be glad of their decision, and will grant leave to appeal if desired.

The order for investment will be made, and the landowner

NEVILLE J. must pay the costs of this application only. I cannot deal with the other costs asked by the summons.

1911

GRAHAM-WIGAN, *In re.*

Solicitors: *Kingsford, Dorman & Co., for Kingsford, Arrowsmith & Wightwick, Canterbury; F. J. Berryman, for Brennan & Brennan, Maidstone.*

J. R. B.

NEVILLE J.

1911

July 20.

In re POPE'S CONTRACT.

[1911 P. 966.]

Vendor and Purchaser—Title—Land purchased by Trustees as Investment under Power—No express Power to vary Investments—Implied Power——Power of Sale—Conflicting Powers of Tenant for Life and Trustees—Consent of Tenant for Life—Concurrence in Conveyance—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 56.

In an ordinary case a direction to trustees to invest in particular investments implies a power to vary investments, and this implied power gives the trustees a power to sell real estate in which they have power to invest for the occupation of a tenant for life.

Where the trustees and the tenant for life both have powers of sale, and the consent of the tenant for life is required under the Settled Land Act, 1882, s. 56, a purchaser is not entitled to insist on the tenant for life concurring in the conveyance, if there is evidence that he in fact consented, though his consent was not in writing.

In re Cooper's Trusts [1873] W. N. 87, followed.

THIS was a vendor and purchaser summons taken out by the purchaser for a declaration that the vendor had not shewn a good title to the hereditaments comprised in the contract and for a return of the deposit and payment of the purchaser's costs of investigating the title.

The contract was in the usual form indorsed on conditions of sale at an auction for the purchase for 895*l.* of a freehold house. The conditions stipulated for the commencement of title, but contained no other conditions or restrictions as to title. The abstract of title shewed a conveyance dated January 14, 1900, to A. W. Claremont and C. J. Clark as joint tenants in fee simple, and a conveyance dated September 6, 1904, from the said A. W. Claremont and C. J. Clark to the present vendor,

Mary Pope, expressed to be made by them "as trustees." A requisition asking why they conveyed "as trustees" produced the answer that they had purchased the property as an investment under the trusts of a settlement dated July 14, 1899, and were selling as trustees thereof. By the settlement Herbert Kingsnorth conveyed to the said A. W. Claremont and C. J. Clark "all his one fifth share and all other his share and interest of in to and out of the property subject to the trusts of" (a will therein recited) "and all interest or income accrued and to accrue therefrom all which together with the moneys stocks shares securities or other property from time to time representing the same are hereinafter referred to as the trust property" to hold the same subject to a mortgage therein mentioned upon trust to pay any mortgages created by the said Herbert Kingsnorth under a power therein contained, and to raise out of the trust property such sums not exceeding 2000*l.* as the said Herbert Kingsnorth should appoint, and to hold the trust property subject to the trusts thereinbefore declared upon trust to receive and take over from the trustees of the said will the trust property and to sell, convert into money, and invest the same and to pay the income thereof to Herbert Kingsnorth for life, and after his death to pay the whole or any part of the income, if and as he should by will direct, to his widow, if any, during her life, and subject thereto to hold the trust property and the income thereof in trust to divide the same equally between such of the children of the said H. Kingsnorth as should survive him and attain twenty-one.

The settlement contained a power for the trustees to invest any moneys in their hands in, among other things, "the purchase of real or leasehold property for the personal use or occupation (either for residential or business purposes or both) of the said H. Kingsnorth." The settlement contained no power to vary investments and no direction or trust to resell a house bought under the power.

The original trustees had purchased the house under this power and, the tenant for life not wishing to reside in it any longer, had sold it to Mrs. Mary Pope, the present vendor.

The whole question in this summons was whether they had

NEVILLE J. 1911 POPE'S CONTRACT, *In re.*

given her a good title. One of the trustees made an affidavit that the sale was in fact made with the consent and by the direction of the tenant for life, and by a deed dated April 29, 1911, and made between Herbert Kingsnorth of the first part, the said A. W. Claremont and C. J. Clark of the second part, and Mary Pope of the third part, which was obtained by way of confirmation after the objection was taken, H. Kingsnorth consented to the sale and to the exercise by the said trustees of the power of sale given to them by the implied power to vary investments contained in the settlement, and the trustees confirmed the sale in exercise of any power they had. The argument as to consent depended on s. 56 of the Settled Land Act, 1882. (1)

H. M. Humphry, for the summons. With the exception of a provision as to commencement of title the contract is an open one. The title of Mrs. Pope, the present vendor, depends on a conveyance from Claremont and Clark, who conveyed as trustees and thus gave notice to the purchaser of the trusts of the settlement. The settlement authorized the trustees to purchase the house agreed to be sold but contained no power to sell it. The deed of confirmation cannot give the purchaser a good title, and it was obtained after the purchaser had repudiated the contract, and a title under it cannot be forced on the purchaser: *In re Head's Trustees and Macdonald.* (2) In any case the concurrence of the tenant for life was necessary under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 56, and has not been obtained.

(1) The Settled Land Act, 1882, s. 56:

"(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

"(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act."

(2) (1890) 45 Ch. D. 310.

Manning, for the vendor. The trustees had a power of sale under the settlement. It has been held in many cases that a power to vary investments gives a power of sale of real estate which the trustees have power to purchase. A power to vary investments will be implied from the mere power to invest: *In re Cooper's Trusts* (1), cited and approved in Lewin on Trusts, 12th ed. p. 543. But in this case there is an express power, for the trustees are directed to sell and convert the trust property, and the trust property has been defined as including investments for the time being. Sect. 56 of the Settled Land Act only requires the consent of the tenant for life, not his concurrence in the conveyance, and there is ample evidence of his consent.

Humphry in reply. There is no authority for the proposition that an ordinary power to invest gives a power to vary except *In re Cooper's Trusts* (1), which is only reported in the *Weekly Notes* and is distinguishable. The trustees there had power to invest sufficient to pay an annuity, not a power to invest particular moneys. A power of sale has never been implied from an implied power to vary. In *Tait* v. *Lathbury* (2) there was a direction that real estate was to be deemed personalty and an express power to vary investments of personalty. In *In re Gent and Eason's Contract* (3) there was an express power to vary, and Farwell J. (as he then was) rested his decision wholly on the construction of the power to vary. But if there is a power, *In re Carne's Settled Estates* (4) shews that Kingsnorth had the powers of a tenant for life, and *In re Baker and Selmon's Contract* (5) shews that the proper way of proving the consent of a tenant for life is that he should concur in the conveyance.

[NEVILLE J. Is there any decision on the question whether a purchaser can insist on the concurrence of the tenant for life?]

Manning. *In re Dickin and Kelsall's Contract* (6) is an authority that under s. 50, which is analogous, the concurrence of the mortgagee of the tenant for life cannot be required.

Humphry. There the contract provided for his consent. But in this case the purchaser had repudiated the contract before the

(1) [1873] W. N. 87.
(2) (1865) L. R. 1 Eq. 174.
(3) [1905] 1 Ch. 386.
(4) [1899] 1 Ch. 324.
(5) [1907] 1 Ch. 238.
(6) [1908] 1 Ch. 213.

NEVILLE J. 1911

POPE'S CONTRACT, *In re.*

consent was obtained. *In re Head's Trustees and Macdonald* (1) shews that I can rely on that rescission.

[NEVILLE J. That point is not open to you upon your affidavit unless you choose to take an adjournment and file fresh evidence.]

Humphry. I do not wish to adjourn. I will rely upon the other points. If the Court is against me, it is plainly a case in which no purchaser could accept the title without a decision of the Court, and the purchaser ought not to be ordered to pay costs: see *In re Baker and Selmon's Contract.* (2)

NEVILLE J. This summons raises a short point which is not without difficulty. The title upon which the vendor relied is a conveyance to her by Claremont and Clark, who are declared to be beneficial owners but conveyed as trustees and thereby disclosed the trusts of a settlement. The purchaser is selling seven years afterwards, and the question is can she make a good title? That depends upon the construction of the settlement and it is not very clear. [His Lordship then examined the words of the settlement defining the trust property and said that he would have great difficulty in holding that an express power of sale was given by those words.]

Then there is a power to invest in various forms of investment and finally "in real or leasehold estate for the occupation for residential or business purposes of the settlor." It is obvious that the purchase of this house was authorized and is treated merely as one of the investments the trustees may make. No intention is shewn to convert any real estate into personalty or any personal estate into real estate. The plaintiff's first contention is that there is no express power to vary investments and therefore no power to sell can be implied. But *In re Cooper's Trusts* (3) is an authority that, where there is no special reason against it, a power to vary investments may be implied from a power to invest. It would be most unfortunate if it were not so. No position could be more unfortunate for cestuis que trust than that their trustees should hold investments which they were

(1) 45 Ch. D. 310. (2) [1907] 1 Ch. 238, 244.
(3) [1873] W. N. 87.

unable to vary; especially when the investments authorized were, as in this case, most of them of a class usually intended to be varied. I hold therefore that in this case the trustees had an implied power to vary, and it follows that they had power to sell this house.

That, however, does not dispose of the case, for it is said that Kingsnorth was tenant for life, or at least a person having the powers of a tenant for life, under the Settled Land Acts. I assume for the purposes of my judgment that that is so. But it is clear from s. 56 that the power of a tenant for life to sell is not intended to put an end to an ordinary power to vary investments. Therefore the tenant for life and the trustees both had power to sell.

Then s. 56 applies. [His Lordship read that section.] I am by no means satisfied that that section means that the consent of the tenant for life must be obtained on every occasion when trustees sell. The section certainly seems capable of a narrower construction. But I assume that in this case consent was necessary in 1904. The evidence shews that the consent was obtained. The purchaser objects that there was no consent in writing, but the section does not require writing. It may be that the purchaser is entitled to have evidence that the sale was made with the consent of the tenant for life, but, assuming that the purchaser was entitled to have such evidence, we have it here in two ways, first from the affidavit of Mr. Claremont, and then from the confirmation deed, so that the question can never be raised on any future occasion as to whether there was consent. The only question, therefore, is whether the trustees had a power of sale with the consent of the tenant for life. I have already expressed my opinion that they had. There must be a declaration that the vendor has shewn a good title, but there seems to have been some misconception on both sides. The title as presented was not clear and perhaps not one which the purchaser could be expected to accept without a decision of the Court. I shall therefore make no order as to costs.

Solicitors: *Peter Ashcroft; Claremont, Haynes & Co.*

J. R. B.

PARKER J
1911
July 5, 6, 7, 26.

MANKS *v.* WHITELEY.

[1910 M. 2758.]

Mortgage—Priority—Merger—Reconveyance and New Mortgage without Notice of Intermediate Charge—Effect of Release of Part of Security.

O. in 1900 mortgaged the Lower Brow Farm to A., and in 1901 he gave M. a collateral security on the same property and on the Gibbett Street property (on which M. had already a first mortgage for 500*l.*). In 1905 O. gave A. a further charge on the Lower Brow Farm. In 1907 O. agreed to sell this farm to L., who obtained the money to pay off A.'s mortgage from F., L. supplying the money required to pay off A.'s further charge. The transaction was carried out by (1.) a reconveyance by A. to O. free from A.'s mortgage and further charge, (2.) a conveyance by O. to L., and (3.) a mortgage by L. to F. Neither L. nor F. had knowledge or notice of M.'s further charge, the fact of the existence of which was suppressed by O. Both the properties were in Yorkshire and all the securities were duly registered in the West Riding Registry.

M., O., and L. in 1910 arranged that L. should purchase the Gibbett Street property for 500*l.*, of which she paid M. 50*l.*, the balance being advanced by a building society. M. transferred the balance of 450*l.* due to him to the society, and conveyed to it the Gibbett Street property subject to a new proviso for redemption but freed from all claims under M.'s collateral security of 1901. O. then conveyed the equity of redemption to L. :—

Held, (1.) that A.'s mortgage and further charge on the Lower Brow Farm had not merged by the transaction of 1907, but that F.'s security had priority over M.'s collateral security of 1901; but (2.) that the release in 1910 of the Gibbett Street property by M. from that security would not disentitle him to enforce his charge on the Lower Brow Farm.

Toulmin v. *Steere* (1817) 3 Mer. 210, distinguished.

The subject of merger of charges considered.

Samuel Ogden on February 2, 1899, mortgaged the Cross Hotel, situate at Haworth in the county of York, to one Manks to secure 1800*l.* with interest thereon at the rate of 4¼ per cent. per annum.

On May 20, 1899, Ogden mortgaged a house, 86, Gibbett Street, Halifax, to Manks to secure 500*l.* and interest.

On April 4, 1900, Ogden mortgaged a freehold property called the Lower Brow Farm, at Haworth, to James Ackroyd to secure 300*l.* and interest.

On July 18, 1900, Ogden gave Manks a further charge on the Cross Hotel for 120*l.*, with interest at 4¼ per cent. per annum, and on June 29, 1901, he gave Manks another further charge on the Cross Hotel to secure 380*l.*, with interest at 5 per cent. per annum. On the occasion of the last transaction Ogden promised to find further security, and this was given by a deed dated October 16, 1901, by which the further advances of 120*l.* and 380*l.* were collaterally charged upon the Gibbett Street house and the Lower Brow Farm, but subject to the existing mortgages on those properties. All the above securities were duly registered in the West Riding of Yorkshire Registry shortly after their execution.

During the negotiations for the security of October 16, 1901, Manks, through his solicitor, discovered a duly registered charge on the Cross Hotel in favour of the Craven Bank, ranking, by virtue of its registration, next after his own mortgage for 1800*l.*, but taking priority over his two further charges. Manks and his advisers being nervous as to the security for the further advances of 120*l.* and 380*l.*, it was arranged between him and Ogden that while the latter would in the usual way pay the amount of the interest on the sums of 1800*l.*, 120*l.*, and 380*l.* respectively, the amount so paid should not be appropriated to payment of interest, but should be taken as applied in part discharge of the principal sums of 120*l.* and 380*l.* until those sums had been wiped out, or at any rate materially reduced, the interest on the 1800*l.* in the meantime getting into arrear and increasing the sum in respect of which Manks had priority over the bank; and his Lordship found as a fact that all payments made by Ogden prior to August 19, 1905, were made on the footing of that arrangement, and that the sums of 120*l.* and 380*l.* were paid off to the extent of the payments so made.

On August 19, 1905, Manks was pressing for payment of the interest in arrear, and it was then agreed, not only that future payments should be taken on account of interest, but that part payments should be re-appropriated to interest instead of to capital account—the effect being to recharge on the Gibbett Street house and the Lower Brow Farm the amount by which the principal sums of 120*l.* and 380*l.* had been already reduced.

PARKER J. 1911 MANKS v. WHITELEY.

In the meantime, on March 25, 1905, Ogden had further charged the Lower Brow Farm in favour of Ackroyd with the sum of 172*l.* 8*s.* 11*d.* and interest, and this charge had been duly registered.

In 1907 Ackroyd was pressing Ogden for repayment of what was due on the mortgage and further charge on the Lower Brow Farm. Ogden was unable to find the money, and offered to sell the property to his daughter, Louisa Whiteley, for 450*l.*, and she accepted the offer conditionally on being able to find some one to advance the amount required to pay off Ackroyd's first mortgage. She instructed a solicitor named Walshaw, telling him that she had agreed to purchase the property for 450*l.*, that Ackroyd had on it a mortgage for 300*l.* and a small further charge, and that she wanted 300*l.* to pay Ackroyd out. Walshaw consulted a client of his called Farrar, who agreed to find 300*l.* on a first mortgage of the property, and Ogden wrote to Walshaw asking him to get the matter through as quickly as possible. Walshaw, acting on behalf of all parties, obtained 300*l.* from Farrar, paid it to Ackroyd, and obtained possession of the title deeds relating to Lower Brow Farm. He next agreed the amount due to Ackroyd on his further charge at 48*l.* 5*s.* 6*d.*, and this he paid out of his firm's moneys, being afterwards recouped by Louisa Whiteley or her husband. Walshaw then prepared and obtained the execution of three deeds to carry out the transaction, all of which were duly registered.

By the first of these deeds, dated August 16, 1907, Ackroyd, in consideration of the payment to him of the moneys secured by his mortgage and further charge, reconveyed the Lower Brow Farm to Ogden, freed and discharged from the mortgage and further charge. By the second deed, of the same date, Ogden, in consideration of 450*l.*, conveyed the same property to Louisa Whiteley. By the third deed, dated the next day, Louisa Whiteley mortgaged the property to Farrar to secure 300*l.* and interest. By arrangement between the father and daughter the balance of the purchase-money, after deducting what was due to Ackroyd, was set off against moneys due by Ogden to Louisa Whiteley. In this transaction none of the parties concerned, except Ogden, had any knowledge or notice of Manks's collateral

security. Walshaw did not search the register. Having got the title deeds and the legal estate for Farrar, he thought it unnecessary to search on his behalf, and he was expressly told by Louisa Whiteley and her husband that he need not search so far as they were concerned.

In 1910 Manks was pressing Ogden for payment of the 500*l.* secured on the Gibbett Street house, and it was arranged between Ogden and Louisa Whiteley that she should purchase that house for 500*l.*, 50*l.* being found by her in cash and 450*l.* raised on mortgage. She paid Manks 50*l.*, and he transferred the 450*l.* remaining due to him to the Halifax Permanent Benefit Building Society, and conveyed the house to that society freed from all claims under the collateral security of October 16, 1901, but subject to a new proviso for redemption, and Ogden then conveyed the equity of redemption in the house to Louisa Whiteley, the result being that she became entitled to the house subject to the claims of the society, but free from the collateral security of October 16, 1901. Manks on October 19, 1910, commenced the present action against Louisa Whiteley, Ogden, and Farrar, claiming a declaration that on the execution of the reconveyance of August 16, 1907, the charge given by the deed of October 16, 1901, became a first charge on the Lower Brow Farm, and that he had priority over the defendants; and an order on them to execute a conveyance of the legal estate to him, subject to the equity of redemption under the deed of October 16, 1901, and to deliver up the title deeds to him.

Louisa Whiteley, by her statement of defence, set up the plea that she had purchased the Lower Brow Farm for valuable consideration without notice of the deed of October 16, 1901, and that she and Farrar had acquired the legal estate without notice of the claim of Manks; and she denied that the deed of October 16, 1901, was in force or had ever given a first charge on the property.

Farrar, by his defence, set up the absence of notice of the claim of Manks, and said that the effect of the latter's release of the Gibbett Street house in 1910 was in equity to disentitle Manks to put in force any claim which he might otherwise have had on the Lower Brow Farm under the deed of October 16, 1901

PARKER J. 1911 MANKS v. WHITELEY.

The action was tried before Parker J. on July 5, 6, and 7, 1911. Ogden, although he had put in a defence, was not represented at the trial.

Romer, K.C., and *Richard Watson*, for the plaintiff. The property in question is situate in the West Riding of Yorkshire and is subject to the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), as amended by the Yorkshire Registries Amendment Act, 1885 (48 & 49 Vict. c. 26). The provision in s. 15 of the former Act that the registration of any instrument under that Act should be deemed to constitute actual notice of such instrument and of the fact of registration to all persons and for all purposes whatsoever, as from the date of registration, was repealed by s. 5 of the Act of 1885. Manks obtained a good charge on the Lower Brow Farm by his charge of October 16, 1901, subject, it is true, to the previous mortgage on that property to Ackroyd, and the charge of October 16, 1901, is still in force.

In 1907 Ackroyd's first mortgage was paid off. It was not transferred, as it would have been if it had been intended to keep it alive, but the property comprised in it was reconveyed to Ogden free from Ackroyd's mortgage. While the property was absolutely free from that mortgage it was conveyed to Louisa Whiteley, who gave an entirely new mortgage on it to Farrar. But all this time the property was subject to the plaintiff's charge of October 16, 1901, which, being prior to the conveyance to Louisa Whiteley and the mortgage to Farrar, gave Manks priority over the title of both those defendants.

Ackroyd's mortgage was not kept alive and was not intended to be kept alive. The form which the transaction took—reconveyance and fresh mortgage—shewed that the intention was not to keep the mortgage alive, but that it should be extinguished both at law and in equity, and that it is a question of intention one way or the other that has to be determined is clear from *Adams* v. *Angell* (1); *Thorne* v. *Cann* (2); *Liquidation Estates Purchase Co.* v. *Willoughby*. (3)

On the principle of *Toulmin* v. *Steere* (4) the rights, if any, of

(1) (1877) 5 Ch. D. 634.
(2) [1895] A. C. 11.
(3) [1896] 1 Ch. 726; [1898] A. C. 321.
(4) 3 Mer. 210.

Farrar determined on the execution of the mortgage by Louisa Whiteley to him.

Where debentures of a company were transferred to the company itself, it was held that the debt and the security were both absolutely gone: *In re George Routledge & Sons, Ld.* (1)

In *In re W. Tasker & Sons, Ld.* (2) Cozens-Hardy L.J., referring to *Hood* v. *Phillips* (3), says: "The intention to keep alive must, in the language of Lord Langdale, not be 'left as matter of implication and inference,' but must be 'clearly and unequivocally expressed.'" In *Crosbie-Hill* v. *Sayer* (4), before this Court, and *Pease* v. *Jackson* (5) there were special circumstances, the decisions being as to the effect of a statutory receipt given by a building society.

It has never been laid down as a general proposition that because a person's money has been applied in paying off a mortgage he is entitled to stand in the mortgagee's shoes for all purposes.

T. J. C. Tomlin, for the defendant Louisa Whiteley. Although Mrs. Whiteley is, having regard to s. 16 of the Yorkshire Registries Act, 1884, unable to rely on the doctrine of tacking, she has a good defence to the plaintiff's claim. The cases cited may be divided into two classes, those in which the parties had knowledge of a claim which might be made, and those in which they had no such knowledge. If Louisa Whiteley and Farrar had known of the existence of the charge of October 16, 1901, their transactions with Ackroyd and Ogden would, doubtless, have taken another form. What they wanted and did their best to obtain was the fee simple, free from incumbrances, and there is nothing to shew that they intended to do anything which would prevent this result from being attained. The question is not one of intention, but whether this money has been applied in paying off a prior incumbrance without notice of an intermediate incumbrance. They ought to succeed on the ground that, having the better equity, the fact that the plaintiff's security

(1) [1904] 2 Ch. 474.
(2) [1905] 2 Ch. 587, 604.
(3) (1841) 3 Beav. 513, 519.
(4) [1908] 1 Ch. 866.
(5) (1868) L. R. 3 Ch. 576.

PARKER J. 1911 MANKS v. WHITELEY

was earlier in point of time ought not to give him priority: *Pease* v. *Jackson*. (1)

J. G. Wood, for the defendant Farrar. It was not necessary to transfer the mortgage debt owing to Ackroyd in order to give Farrar the same priority: *Phillips* v. *Gutteridge*. (2)

The doctrine of subrogation, as explained in *Baroness Wenlock* v. *River Dee Co.* (3), may be prayed in aid of the defendant's claim; and the Court will presume that Ackroyd's mortgage was kept alive for Farrar's benefit: *Butler* v. *Rice*. (4)

Any rights which the plaintiff had against Farrar were given up by the former's releasing the Gibbett Street house from his security, on the principle applicable where a creditor has given up a security for a guaranteed debt or has taken a substituted security. The result of the release was that the plaintiff could not be forced to marshal his securities.

What occurred by reason of Ogden's concealment of the plaintiff's charge cannot be allowed to enure for the plaintiff's benefit, as no consideration moved from him: *Scholefield* v. *Templer*. (5)

Romer, K.C., in reply. There is no analogy between the relation of a creditor and his surety and that of a mortgagor and mortgagee. It has been held that the release of a vendor's lien upon one of several properties subject to the lien will not affect the vendor's right to enforce his lien on the other properties, unless when the vendor gave the release he knew that the original purchasers had parted with the other properties: *Kettlewell* v. *Watson*. (6)

Cur. adv. vult.

July 26. PARKER J. On February 2, 1899, the defendant Samuel Ogden mortgaged the Cross Hotel to the plaintiff to secure 1800*l.* with interest at 4½ per cent. per annum. On May 20, 1899, he mortgaged the Gibbett Street house to the plaintiff to secure 500*l.* with interest. On April 4, 1900, he mortgaged his Lower Brow property to James Ackroyd to secure 300*l.* and

(1) L. R. 3 Ch. 576.
(2) (1859) 4 De G. & J. 531.
(3) (1887) 19 Q. B. D. 155.
(4) [1910] 2 Ch. 277.
(5) (1859) John. 155.
(6) (1882) 21 Ch. D. 685. See S. C. on appeal, (1884) 26 Ch. D. 502.

interest. On July 18, 1900, he charged the Cross Hotel in the plaintiff's favour with a further sum of 120*l.* with interest at 4¼ per cent. per annum, and on June 29, 1901, he charged the same property in the plaintiff's favour with a further sum of 380*l.* with interest at 5 per cent. per annum. On the occasion of this last transaction the mortgagor promised to find further security, and this was subsequently given by an indenture dated October 16, 1901, whereby the further advances of 120*l.* and 380*l.* were collaterally charged upon the Gibbett Street house and the Lower Brow property, subject nevertheless to the existing mortgages. All the mortgages I have mentioned up to this point were duly registered in the Yorkshire Registry shortly after their execution.

In the course of the negotiations which led up to the collateral security of October 16, 1901, the plaintiff, through his solicitor, discovered that there was a duly registered charge on the Cross Hotel in favour of the Craven Bank ranking, by virtue of the registration, next after his mortgage for 1800*l.* and taking priority over the further advances of 120*l.* and 380*l.* Having regard to this fact and to the value of the equities of redemption in the Gibbett Street house and Lower Brow property, the plaintiff and his advisers were somewhat nervous as to the security for these further advances. It was therefore arranged between the plaintiff and the mortgagor that, while the mortgagor would in the usual way pay the amount of interest accruing due on the sums of 1800*l.*, 120*l.*, and 380*l.* respectively, the amount so paid should not be appropriated towards payment of such interest, but should be taken as in part discharge of the principal sums of 120*l.* and 380*l.* till such sums had been wiped out, or at any rate materially reduced. Meanwhile the interest on this 1800*l.* would remain in arrear and increase the sum in respect of which the plaintiff had priority over the Craven Bank. I find as a fact that all payments made by Samuel Ogden prior to August 19, 1905, were made on this footing, and that the principal sums of 120*l.* and 380*l.* were paid off to the extent of the payments so made.

On August 19, 1905, a new agreement was come to. Apparently the plaintiff was pressing for the payment of interest

PARKER J. 1911 MANKS v. WHITELEY.

in arrear, and it was accordingly arranged, not only that future payments should be taken on account of interest, but that past payments should be re-appropriated to interest instead of capital account. The effect of this agreement was, of course, to re-charge on the Gibbett Street house and the Lower Brow property the amount by which the principal sums of 120*l.* and 380*l.* had been already reduced. Meanwhile, however, namely, on March 25, 1905, Samuel Ogden had further charged the Lower Brow property in favour of James Ackroyd with the sum of 172*l.* 8*s.* 11*d.* and interest, and such further charge had been duly registered. I may observe that Samuel Ogden altogether denied that there was any such agreement as that to which I have referred, but on this point I accept the evidence of George Henry Manks. I also accept the evidence of this gentleman to the effect that there was no agreement whereby the 750*l.* compensation paid when the Cross Hotel lost its licence was appropriated towards repayment of what remained due in respect of the further charges of 120*l.* and 380*l.*

In the year 1907 James Ackroyd was pressing Samuel Ogden for repayment of what was due in respect of the mortgage and further charge on the Lower Brow property. Samuel Ogden, being unable to find the money, offered to sell the property to his daughter, the defendant Louisa Whiteley, for 450*l.* This defendant, after consultation with her husband, accepted the offer conditionally on her being able to find some one to advance the amount required to pay off Ackroyd's 300*l.* mortgage. She and her husband accordingly instructed Mr. Saxon Walshaw, a solicitor, telling him that the lady had agreed to purchase the property for 450*l.*, that Ackroyd had on it a mortgage for 300*l.* and a small further charge, and that she wanted 300*l.* to pay Ackroyd out. Mr. Walshaw consulted the defendant Farrar, an old client, who, after inspecting the property, agreed to find 300*l.* on a first mortgage. Samuel Ogden also wrote to Mr. Walshaw asking him to get the matter through as quickly as possible. Mr. Walshaw thereupon proceeded to carry out the transaction on behalf of all parties. First he obtained 300*l.* from the defendant Farrar, and, having paid it to Ackroyd, obtained possession of the title deeds relating to Lower Brow. He then agreed the amount due

to Ackroyd on his further charge at 48*l.* 5*s.* 6*d.*, which he paid out of his firm's moneys, being subsequently recouped out of moneys provided by the defendant Louisa Whiteley or her husband. He then prepared and in due course obtained the execution of certain deeds to carry the transaction into effect. These deeds were three in number and were all of them duly registered. By the first, which is dated August 16, 1907, James Ackroyd, in consideration of the payment to him of the moneys secured by his mortgage and further charge, reconveyed the property to Samuel Ogden. By the second, which bears the same date, Samuel Ogden, in consideration of 450*l.*, conveyed the property to his daughter Louisa Whiteley, and by the third, which bears date the next day, Louisa Whiteley mortgaged the property to the defendant Farrar to secure 300*l.* and interest. It appears that, by arrangement between Louisa Whiteley and her father, the balance of the 450*l.* purchase-money, after deducting the sums paid to Ackroyd, was set off against moneys due to her by her father. Throughout these transactions none of the parties concerned, except Samuel Ogden, had any knowledge or notice of the plaintiff's collateral security of October 16, 1901. Mr. Walshaw did not search the Yorkshire Registry, nor is such registry itself notice. Mr. Walshaw, having obtained the title deeds and the legal estate for the defendant Farrar, thought it unnecessary to search on his behalf, and he was expressly told by the defendant Louisa Whiteley and her husband that he need not search the register so far as they were concerned.

Samuel Ogden attempted to justify his silence with respect to the collateral security of October 16, 1901, by saying he believed it had been paid off and satisfied out of the 750*l.* compensation money. Whether he believed this or not, he certainly had no reasonable ground for his belief, and he knew that the security still remained in the plaintiff's hands. It is quite clear that all parties intended that the defendant Farrar should become first mortgagee for 300*l.*, and that the defendant Louisa Whiteley should become the owner of the equity of redemption subject only to Farrar's mortgage. If Samuel Ogden had, as he clearly ought to have done, disclosed the existence of this collateral security of October 16, 1901, either the transaction would have fallen through

PARKER J. 1911 MANKS v. WHITELEY.

altogether, or it would have been carried out in such manner as to give effect, as far as possible, to the intention of the parties, by making it clear that Ackroyd's mortgage and further charge were kept alive for their protection. The plaintiff contends that, having regard to the manner in which the transaction was in fact carried out, the mortgage and further charge have not been so kept alive, and that he is entitled to take advantage of the manner in which, owing to Samuel Ogden's wrongful silence, the transaction was in fact carried out to obtain a benefit which it was never intended to confer upon him.

The question I have to determine is whether this contention is correct, or whether I can treat Ackroyd's mortgage and further charge as still on foot for the purpose of putting the persons wronged by Samuel Ogden in the position in which they could have been put, and would almost certainly have been put, if Samuel Ogden had disclosed the existence of the collateral security.

If the benefit of a charge on property and the property subject to the charge vest in the same person, then, as a general rule, equity will treat the charge as kept alive or merged according to whether it be of advantage or of no advantage to the person in whom the two interests have vested that the charge should be kept alive. But in either case clear proof of intention to the contrary will displace the general rule, merger in equity being for the most part a question of intention only, and the general rule being justified by a presumption of intention where there is no clear evidence one way or another. It is to be observed that, where it is to the advantage of the person in whom the two interests have vested that the charge should be kept alive, a person insisting on merger is insisting on a gift, and it is quite reasonable that the onus of proving intention to give should rest on him.

There seems to be no logical reason why the rule as above stated should not be applicable in whatever manner the charge and the property charged become united in the same ownership. Consider, for instance, the case of property subject to a first and second mortgage and the mortgagor devising the property to A., the first mortgagee. It is clearly to A.'s advantage to keep

the first mortgage alive as a protection against the second mortgage. The rule, therefore, applies, and if the second mortgagee sets up a merger, he must adduce clear evidence of A.'s intention in that behalf. Suppose, however, the property be devised to B., a stranger, and B. pays off the first mortgage; or suppose the mortgagor and the first mortgagee convey the property to B., the first mortgagee being paid off out of the purchase-money; or again suppose the first mortgagee takes a release from the mortgagor of the equity of redemption—in each and every of these cases it is equally to the advantage of the person in whom the two interests have united that the first mortgage should be kept alive, for, if there be a merger, the transaction will enure to the benefit of the second mortgagee, who is a stranger and has given no consideration. No doubt, if the person in whom the interests have united is a party to the transaction from which the union results, the form which this transaction takes is relevant to the question of actual intention, but where there is no clear evidence of an actual intention in favour of merger, there would seem to be no reason why the general rule should not be applicable. There are, however, authorities to the effect that, in each of the last three mentioned cases, the general rule is inapplicable, and that equity will treat the first mortgage as merged for the benefit of the second mortgagee, unless there be proof of actual intention to keep it alive.

Even in cases in which the person in whom the interests have united is aware of the second mortgage, the authorities to which I am referring have sometimes led to the curious anomaly of the Courts of Equity first raising a presumption which is against the probable intention, but which must nevertheless on principle be based on the probable intention, and then laying hold of the improbability of the intention as a reason for holding on slight evidence that presumption is rebutted.

If, however, the authorities to which I have referred extend to cases in which the person in whom the interests have united is ignorant of the existence of the second mortgage, they must inevitably entail hardship and injustice, for they enable a stranger who has given no consideration to take advantage of

PARKER J. 1911 MANKS v. WHITELEY.

another's ignorance and to secure at another's expense, from a transaction to which he was not a party, an advantage certainly never intended for him.

The authorities to which I have referred consist of the case of *Toulmin* v. *Steere* (1) and the cases in which *Toulmin* v. *Steere* (1) has been followed, commented on, or explained. In *Toulmin* v. *Steere* (1) one Richard Witts had first created a first mortgage of 5,000*l.*, then charged the estate with an annuity of 180*l.*, and had finally created a second mortgage for 3000*l.* He subsequently sold the estate to the trustees of a certain will, to whom the property was in due course conveyed, the owner of the 5000*l.* and 3000*l.* mortgages joining in the conveyance, and these mortgages being discharged out of the purchase-money. The purchasers had no actual knowledge of the annuity, but it was held they were affected with notice of it through their solicitor. It followed from this that they could not, as against the annuitant, rely on the plea of purchase for value without notice. It was further argued and held that the purchasers were in no better position than the vendor Witts would have been in if he had paid off the mortgages out of his own money. Had he done this, he could not, even if he had affected to keep the 5000*l.* mortgage alive, have set it up against his own subsequent incumbrance. The purchasers, therefore, could not set up the first mortgage against the annuity, and the annuitant consequently had the first charge. It is true that the question of merger was argued, and that Sir William Grant mentions the mortgages as having ceased to exist, but the whole gist of the decision is that the purchasers were in no better position than the vendor, who could not have set up the mortgages against a subsequent incumbrancer of his own, even if he had kept them alive. So far as the mortgagor was concerned, the principle is correctly stated, being that for which the subsequent case of *Otter* v. *Lord Vaux* (2) is now generally cited as the leading authority. So far, however, as the purchasers were concerned, it is now quite certain that this principle had no application. A purchaser from a mortgagor and first mortgagee can, if he chooses, always keep the first mortgage alive to protect himself against subsequent incumbrances,

(1) 3 Mer. 210. (2) (1856) 2 K. & J. 650.

and it makes no difference whether he had or had not any notice of them, or whether the notice, if any, was actual or only constructive. That this was the real decision in *Toulmin* v. *Steere* (1) is, I think, confirmed if the cases cited by Sir William Grant be referred to.

In the earlier case of *Greswold* v. *Marsham* (2) a first mortgagee with notice of two judgments, but with no notice of a third judgment, took a conveyance of the equity of redemption. It is said the two judgment creditors who had given notice had a decree for payment against the first mortgagee, but the third judgment creditor, who had given no notice, had no relief. It is not clear what a decree for payment means. Certainly, according to our present law, the judgment creditors would have no right to recover personal judgment against the first mortgagee. At the most, they would be entitled to relief in the nature of a foreclosure decree, and on the principle enunciated by Sir William Grant they would be entitled to this decree without redeeming the first mortgage. The question of merger is not mentioned in the report, and, if the case is to be explained as one of merger, it amounts to a decision that, though the first mortgage must be treated as merged so far as concerned subsequent incumbrances of which the first mortgagee had notice when he took a conveyance of the equity of redemption, it was not to be treated as merged so far as concerned subsequent incumbrances of which the first mortgagee had no notice. *Mocatta* v. *Murgatroyd* (3), being the second case cited by Sir William Grant, presents also some difficulty, but it is at least clear that, so far as it turned on merger, it is in reality an authority that a first mortgagee taking a release of the equity of redemption may set up his first mortgage against subsequent incumbrancers, provided he waive the release—in other words, there is a presumption against merger.

Under those circumstances it is, I think, somewhat curious that the decision in *Toulmin* v. *Steere* (1) can come to be regarded as a decision on merger at all. Probably, as soon as it ceased to be justifiable on the principle for which *Otter* v. *Lord Vaux* (4) is now the leading authority, merger was suggested as a possible

(1) 3 Mer. 210.
(2) (1685) 2 Ch. Cas. 170.
(3) (1717) 1 P. Wms. 393.
(4) 2 K. & J. 650.

PARKER J. 1911 MANKS v. WHITELEY.

explanation, and, having been so suggested, came to be regarded as the basis of the decision. Unfortunately, treated as a decision on merger, *Toulmin* v. *Steere* (1) has introduced an exception into what otherwise would be a consistent principle, an exception which has always been regarded as anomalous. Still the case has never been overruled, and has been said to be still binding on Courts of first instance, if not on the Court of Appeal, though there is plenty of authority that the rule it is supposed to lay down is not to be extended.

Thus, it has been said to be confined to cases in which the purchaser had notice, actual or constructive, of the subsequent incumbrance, though, in considering questions of intention, notice which is only constructive ought, logically speaking, to be equivalent to no notice at all, and, if *Toulmin* v. *Steere* (1) be good law in the one case, it ought logically to be extended to cover the other. I have, however, already pointed out that *Greswold* v. *Marsham* (2), if looked upon as a case of merger at all, appears to draw this distinction between notice actual or constructive and no notice at all.

Returning to the actual facts of this case, it seems to me reasonably clear that the defendant Farrar, having—at the request of the defendant Louisa Whiteley, if not also of Samuel Ogden—paid off Ackroyd's first mortgage, and obtained the title deeds, became entitled in equity to the benefit of such mortgage. On the same principle the defendant Louisa Whiteley, or her husband, on paying off Ackroyd's further charge, became entitled in equity to the benefit of such further charge. The rights of the defendants Farrar and Louisa Whiteley would not be affected by the reconveyance to Samuel Ogden if the transaction had stopped at that point, nor would the rights of the defendant Farrar be affected by the conveyance from Samuel Ogden to the defendant Louisa Whiteley had there been no further deed. So far as the defendant Farrar is concerned, the question would appear to be whether his equitable security merged when he took a further security from the defendant Louisa Whiteley. If *Toulmin* v. *Steere* (1) applies, the presumption is that it did. If *Toulmin* v. *Steere* (1) is inapplicable, the presumption is that it

(1) 3 Mer. 210. (2) 2 Ch. Cas. 170.

did not. I cannot discover that the rule supposed to be laid down in *Toulmin* v. *Steere* (1) has ever been applied to the case of a mortgagee taking a further security, and it would appear from *Worthington* v. *Morgan* (2) that it is not so applicable. At any rate, I am not to extend the application of the rule. The onus therefore lies on the plaintiff to shew an actual intention on the part of the defendant Farrar in favour of merger. The only evidence in favour of an intention to merge consists in the manner in which the whole transaction was in fact carried out. That the form which the transaction takes is not by any means conclusive is, I think, clear from the case of *Burrell* v. *Lord Egremont* (3), where a tenant for life, having paid off a charge, procured the inheritance to be released therefrom under circumstances which negated the possibility of any actual intention on his part to keep the charge alive, and it was nevertheless held that no intention to merge had been proved.

In the present case the form which the transaction took is not necessarily inconsistent with an intention to keep the charge alive. There would have been no repugnancy or inconsistency if the mortgage to the defendant Farrar had contained a declaration against merger. Under these circumstances I hold, in accordance with the general principle, that the presumption against merger is not displaced.

With regard to the second charge, to the benefit of which the defendant Louisa Whiteley or her husband became entitled, the matter is somewhat different. If the husband became entitled to the benefit of the charge, certainly nothing has happened to defeat his interest. If, however, the defendant Louisa Whiteley became entitled to the charge, the question is whether it merged on the conveyance to her of the equity of redemption. If *Toulmin* v. *Steere* (1) applies, the presumption is in favour of merger, and there is nothing to shew an intention to keep the second charge alive, except the improbability of any intention to merge it. The manner in which the two interests became united in the defendant Louisa Whiteley cannot, I think, fairly distinguish the case from *Toulmin* v. *Steere* (1), but the case is distinguishable from

(1) 3 Mer. 210. (2) (1849) 16 Sim. 547.
(3) (1844) 7 Beav. 205.

PARKER J. 1911 MANKS v. WHITELEY.

Toulmin v. *Steere* (1) in that the defendant Louisa Whiteley had no notice (even constructive) of the subsequent incumbrance. I do not say that this distinction is logical—I do not think it is—but, having regard to the fact that, though I am bound by *Toulmin* v. *Steere* (1), I am equally bound not to extend the rule which it is supposed to lay down, I think the distinction is sufficient, more especially as the rule in *Toulmin* v. *Steere* (1) admittedly introduces an exception into the general equitable doctrine; and, moreover, one of the cases cited in *Toulmin* v. *Steere* (1), if considered as deciding a question of merger, draws this very distinction.

I hold, therefore, that, notwithstanding *Toulmin* v. *Steere* (1), the presumption is against merger, and that it is for the plaintiff to shew an actual intention to merge. Again, the only evidence which can be said to point to such an intention is the manner in which the transaction as a whole was carried into effect, and I do not think this is, under the circumstances, sufficient to displace the presumption.

I should like to add this: Even if I were of opinion that *Toulmin* v. *Steere* (1) applied to this case, no intention to keep the mortgage and further charge alive being proved, I am not prepared to say that my decision would have been different. But for the existence of the further charge of October 16, 1901, it would have been a matter of indifference to the parties whether they merged the securities or otherwise. This further charge was improperly concealed from them. I doubt whether it is consistent with general equitable principles to allow a third party to claim in a Court of Equity an advantage never intended for him, for which he has given no consideration, and his only title to which rests on a transaction voidable between the parties to it on the ground of fraud or misrepresentation. It would not, in my opinion, be any great extension of the principles laid down in *Huguenin* v. *Baseley* (2) and *Scholefield* v. *Templer* (3), if it be an extension at all, to hold that this was impossible. In this connection I may refer to Lord Macnaghten's speech in *Thorne* v. *Cann* (4) and Lindley L.J.'s judgment in *Liquidation*

(1) 3 Mer. 210.
(2) (1807) 14 Ves. 273.
(3) John. 155.
(4) [1895] A. C. 11.

Estates Purchase Co. v. *Willoughby* (1), and my own decision in *Crosbie-Hill* v. *Sayer*. (2)

I hold, therefore, that the priorities are as follows: First, the defendant Farrar, as equitable transferee of Ackroyd's mortgage of April 4, 1900; secondly, the plaintiff under the collateral security of October 16, 1901, so far as the sums of 120*l.* and 380*l.* thereby secured had not been discharged by payments made by the mortgagor prior to August 19, 1905, all payments by the mortgagor to this date being taken on account of principal; thirdly, the defendant Louisa Whiteley in respect of Ackroyd's further charge of March 25, 1905; and fourthly, such charge as the plaintiff is entitled to under the agreement of August 19, 1905.

I may observe that there is this further point about the last-mentioned charge, which was not argued, but on which I am ready, if necessary, to hear argument. Either this charge was registrable or it was not. If it was registrable, there was certainly no registration, and the interest taken by Louisa Whiteley under the conveyance to her of August 16, 1907, which was registered, would appear to have, under s. 14 of the Yorkshire Registries Act, 1884, priority over this charge. If, on the other hand, this charge was not registrable, I see, at present, no reason why Louisa Whiteley should not be entitled to rely on the plea of purchase for value without notice.

Finally an argument was put forward based on the doctrine of marshalling. It appears that in 1910 the plaintiff was pressing Samuel Ogden for payment of the 500*l.* secured on the Gibbett Street house, and an arrangement was therefore made between the plaintiff, Samuel Ogden, and Louisa Whiteley that Louisa Whiteley should purchase the Gibbett Street house for 500*l.*, 50*l.* being found by her in cash and 450*l.* raised on mortgage. This arrangement was carried out in the following manner. Louisa Whiteley paid to the plaintiff 50*l.* The plaintiff transferred the 450*l.* remaining due to him to the Halifax Permanent Benefit Building Society and conveyed to such society the Gibbett Street house freed from all claims under the collateral security of October 16, 1901, but subject to a new proviso for redemption, and Samuel

(1) [1896] 1 Ch. 726, 734. (2) [1908] 1 Ch. 866.

PARKER J. 1911 MANKS v. WHITELEY.

Ogden then conveyed this equity of redemption to Louisa Whiteley. The result was that Louisa Whiteley became entitled to the property subject to the claim of the society, but free from the plaintiff's collateral security of October 16, 1901. It was argued that this transaction was in derogation of the rights of the defendants Farrar and Louisa Whiteley to compel the plaintiff to marshal his securities in their favour, and has therefore disentitled the plaintiff to enforce his collateral security on the Lower Brow property. I do not take that view. The equitable right of marshalling has never been held to prevent a prior mortgagee from realizing his securities in such manner and order as he thinks fit. The transaction in question seems to me to have been in effect a bona fide sale of the property to Louisa Whiteley, who would certainly not have given 500*l.* for the property if it were to remain burdened with the collateral security of October 16, 1901.

I cannot give the plaintiff any of the relief which he claims. I therefore dismiss the action with costs.

Solicitors for plaintiff: *Burn & Berridge, for G. H. Manks, Elland.*

Solicitors for defendant Whiteley: *R. F. & C. L. Smith, for Spencer, Clarkson & Co., Keighley.*

Solicitors for defendant Farrar: *Williamson, Hill & Co., for Walshaw & Son, Halifax.*

F. E.

CENTRAL LONDON RAILWAY COMPANY *v.* CITY OF LONDON LAND TAX COMMISSIONERS.

C. A. 1911

[1910 C. 3140.]

June 26, 27, 28; *July* 23.

Revenue—Land Tax—Redemption—Land Abutting on Highway—Exoneration ad medium filum—Presumption—Subsequent Construction of Underground Railway—Part under Highway—Exemption from Assessment—Land Tax Act, 1797 (38 *Geo.* 3, *c.* 5), *ss.* 4, 17, 18, 80—*Land Tax Redemption Act*, 1802 (42 *Geo.* 3, *c.* 116), *ss.* 8, 38.

Where the land tax upon land adjoining a public highway has been redeemed, the presumption that the soil of the highway ad medium filum belongs to the owner of the adjoining land applies so as to extend the exoneration from tax to the middle of the highway.

A railway was constructed, under statutory powers, partly beneath a highway adjoining lands which had been previously exonerated from land tax:—

Held, by Cozens-Hardy M.R. and Kennedy L.J. (Farwell L.J. dissenting), that the portion of the railway under the moiety of the highway abutting on the exonerated lands was not liable to land tax.

Decision of Swinfen Eady J. on this point [1911] 1 Ch. 467, reversed.

Appeal from so much of the decision of Swinfen Eady J., upon a special case (1), as declared that where the land tax had been redeemed on lands, tenements, and hereditaments fronting, adjoining, or abutting upon a public street or highway, such redemption did not extend to the middle line of the street or highway so as to exonerate from the payment of land tax so much of the appellants' railway and works as was situate under such street or highway.

The appellants were a company incorporated by the Central London Railway Act, 1891 (54 & 55 Vict. c. cxcvi.), and by that Act and the Central London Railway Act, 1892 (55 & 56 Vict. c. ccxli.), they were empowered to construct a railway and other works partly within the city of London. A portion of the railway was constructed partly under the surface of certain streets or highways in the city and partly under land abutting on the said streets or highways. Before the construction of the railway the land tax on certain of the lands abutting

(1) [1911] 1 Ch. 467.

C. A. 1911 — CENTRAL LONDON RAILWAY v. CITY OF LONDON LAND TAX COMMISSIONERS.

on these streets or highways had been redeemed and the lands exonerated therefrom, but in no case was the highway specifically included in the contract for redemption or shewn in any plan annexed thereto.

Various questions were raised upon the special case as to the liability of the appellants for land tax. They were summarized in the judgment of Swinfen Eady J. as follows (1): "The plaintiffs" (appellants) "contend that where the land tax has been redeemed in respect of lands abutting on a highway the exoneration extends to the middle line of the highway; and also that so much of the plaintiffs' railway as is constructed below the surface of lands so exonerated is not liable to tax, on the ground that the lands are exonerated a centro usque ad cælum. The defendants dispute the allegation that the boundary of the lands exonerated extends to the middle line of the highway; and they also contend that even if the tax has been redeemed in respect of the lands beneath which the railway has been constructed, yet the railway and works are a new hereditament, and as no redemption of land tax has been effected in respect of that new hereditament, the plaintiffs are liable to pay land tax in respect thereof."

Swinfen Eady J. answered the special case by determining that the plaintiffs were not liable to pay land tax in respect of so much of their railway and works as was situate under any lands, tenements, or hereditaments as had been exonerated from the land tax before the construction of the railway; but that where the tax had been redeemed on lands or houses abutting on a public street or highway, the exoneration did not extend to the middle line of the street or highway.

Against the latter part of this holding the plaintiffs appealed.

Macmorran, K.C., and *Konstam*, for the appellants. The finding of Swinfen Eady J. that where the tax has been redeemed on lands or houses abutting on the highway the exoneration does not extend to the middle of the street or highway is wrong.

Land tax is imposed and levied under the Land Tax Act, 1797, ss. 4, 17, 18, 80, and can be redeemed under the Land Tax

(1) [1911] 1 Ch. 473.

Redemption Act, 1802, ss. 8, 38. The Finance Act, 1896, s. 32, also provides for its redemption by the owner.

Though a highway in itself has no assessable value, a railway tunnel under the highway is a hereditament prima facie assessable, and it is subject to land tax unless the site has been exonerated : *Metropolitan Ry. Co.* v. *Fowler.* (1) In *Westminster Corporation* v. *Johnson* (2) a lavatory constructed under the highway was held to be assessable ; but a tunnel or other buildings constructed under land on which the land tax has been redeemed before the construction are not assessable : *Newton, Chambers & Co.* v. *Hall.* (3)

There is a presumption that the soil of a highway ad medium filum belongs to the owner of the adjoining land : *Doe* v. *Pearsey* (4), and passes by a conveyance or grant of the adjoining land although not specially mentioned or shewn on the plan : *Berridge* v. *Ward* (5) ; *Tilbury* v. *Silva* (6) ; *In re White's Charities.* (7) If an owner mortgages or charges his property he charges the whole of it ad medium filum if bordered by a road or a stream, and when he pays off the mortgage the whole property is released ; so also when an owner redeems the land tax he redeems it on the whole, and ad medium filum in the case of land abutting on a road. The same presumption, therefore, that applies to conveyances and grants applies to the discharge of an incumbrance or the redemption of land tax, which is an incumbrance, and the exoneration extends ad medium filum. A street or highway is not exempted from land tax, but, having no value for occupation purposes, it is not separately assessed, but half of it belongs to the adjoining land or houses.

The land tax is assessed on the annual value, which merely supplies the measure of the tax, but none the less it is a tax on the owner, and in that sense the tax is on the occupation value. In the city of London there is no vesting of the streets in the local authority as there is in the case of urban districts ; the owner can therefore make a cellar or tunnel under the street

(1) [1893] A. C. 416, 427.
(2) [1904] 2 K. B. 737.
(3) [1907] 2 K. B. 446.
(4) (1827) 7 B. & C. 304.
(5) (1861) 10 C. B. (N.S.) 400.
(6) (1890) 45 Ch. D. 98.
(7) [1898] 1 Ch. 659.

C. A. 1911 — CENTRAL LONDON RAILWAY v. CITY OF LONDON LAND TAX COMMISSIONERS.

adjoining his house so long as he does not interfere with the right of the public to use the surface; subject to this the owner of the adjoining house is absolute owner of half the street. The land tax is imposed on the whole of the owner's property, and when redeemed the whole is exonerated from land tax.

It is admitted that in practice a highway is not assessed separately, not being the subject of beneficial occupation: *Great Eastern Ry. Co.* v. *Hackney Board of Works* (1); *Hare* v. *Putney Overseers.* (2)

Poor rate, property tax, and succession duty are all assessed by the measure of annual value, and in all these cases it cannot be supposed that land ad medium filum has not been included. The principle of assessment is considered in *Knight* v. *Landport District Drainage Board.* (3)

[*Wishart* v. *Wyllie* (4), *Orr Ewing* v. *Colquhoun* (5), *Rolls* v. *Vestry of St. George the Martyr, Southwark* (6), and *Hodgson* v. *Pearson* (7) were also cited or referred to.]

Danckwerts, *K.C.*, and *Bremner*, for the respondents. It is admitted that, as a matter of construction, a grant of land abutting on a highway carries the land ad medium filum. The origin of this presumption is stated in *Doe* v. *Pearsey* (8), *Lord* v. *Commissioners for City of Sydney* (9), and *Dwyer* v. *Rich* (10), and the effect and rebuttal of this presumption is considered again in *Leigh* v. *Jack* (11), *Plumstead Board of Works* v. *British Land Co.* (12), *Pryor* v. *Petre* (13), and *Mappin Brothers* v. *Liberty & Co., Ld.* (14) It is therefore rather a question of construction in each case whether the half of the highway is included.

The certificate of the contract for redemption is the proper evidence of what lands were assessed and exonerated: *Buchanan* v. *Poppleton* (15); *Hodgson* v. *Pearson* (7); and unless the land

(1) (1883) 8 App. Cas. 687.
(2) (1881) 7 Q. B. D. 223.
(3) [1898] 1 Q. B. 588.
(4) (1853) 1 Macq. 389.
(5) (1877) 2 App. Cas. 839, 854.
(6) (1880) 14 Ch. D. 785, 801.
(7) (1874) 31 L. T. 679.
(8) 7 B. & C. 304.
(9) (1859) 12 Moo. P. C. 473, 498.
(10) (1871) Ir. R. 6 C. L. 144, 150.
(11) (1879) 5 Ex. D. 264.
(12) (1874) L. R. 10 Q. B. 16.
(13) [1894] 2 Ch. 11.
(14) [1903] 1 Ch. 118.
(15) (1858) 4 C. B. (N.S.) 20, 53.

has been assessed to land tax the tax cannot be redeemed. The general nature of the land tax is discussed in *Reg.* v. *Land Tax Commissioners.* (1)

The tax is assessed on the annual value, and the tenant can deduct such proportion of the tax as the rent bears to the total annual value so that the landlord bears an aliquot part: *Rex* v. *Inhabitants of Mitcham* (2); *Ward* v. *Const* (3); *Smith* v. *Humble.* (4) The Commissioners are in the nature of a judicial tribunal, and an assessment not appealed is binding: *Simpkin* v. *Robinson* (5); *Reg.* v. *Land Tax Commissioners.* (6) [42 Geo. 3, c. 116, ss. 3, 7, 8, 35, and 180, was referred to.]

The essentials for taxation are occupation and annual value: *In re Hackney and Lamberhurst Tithe Commutation Rent-charges.* (7)

The presumption here is that the assessment did not include these streets. There were no cellars or other buildings under them capable of being assessed, and, not being the subject of beneficial occupation, they were presumably neither assessed nor exonerated. Assessment depends on beneficial occupation: *Winstanley* v. *North Manchester Overseers.* (8) The basis of assessment is annual value. If there is no annual value there is no measure of assessment. The presumption, therefore, cannot be made in such a case as this. Occupation is the test. Without actual de facto beneficial occupation there can be no assessment: *Lord Colchester* v. *Kewney* (9); *Lambeth Overseers* v. *London County Council* (10); *Hare* v. *Putney Overseers.* (11)

The presumption in the case of a grant rests upon the intention of the grantor to pass the whole of his property. Where it can be shewn that there is any interest in not parting with the whole the presumption does not arise. When the reason for the presumption does not apply the presumption itself does not apply either. There is no reason why it should arise in this case. The annual value of the highway is in the house by reason of its propinquity. All that can be taxed is that which is

(1) (1853) 2 E. & B. 694.
(2) (1783) Caldecott, 276.
(3) (1830) 10 B. & C. 635.
(4) (1854) 15 C. B. 321.
(5) (1881) 45 L. T. 221.
(6) (1894) 58 J. P. 446.
(7) (1858) E. B. & E. 147.
(8) [1910] A. C. 7.
(9) (1867) L. R. 2 Ex. 253.
(10) [1897] A. C. 625.
(11) 7 Q. B. D. 223.

C. A. 1911

CENTRAL LONDON RAILWAY v. CITY OF LONDON LAND TAX COMMISSIONERS.

capable of producing profit. There is no case which shews that the doctrine applies to a tax. On the plans the street is not included. There is no occasion and no room for the presumption in this case, and none should be made.

Macmorran, K.C., in reply. It is said that there is no land tax if there be no occupation. But the tax is on the land itself irrespective of occupation. A highway is capable of being assessed. It is admitted that the ownership of the highway is in the owners of the adjoining houses. It is not an independent hereditament. It is taxed with the house, and it is necessary to deal with the whole property in considering whether the tax has been redeemed. The subsoil of the highway cannot be redeemed separately because it has not been separately assessed. There is no reason why the presumption should not apply to the assessment of land tax and the notification of redemption thereof founded on such assessment. The appellants are not liable to tax in respect of the subsoil of the streets when the tax on the adjoining houses has been redeemed.

[*Charing Cross Bridge Co.* v. *Mitchell* (1) and *Davison* v. *Gill* (2) were also referred to.]

Cur. adv. vult.

July 23. COZENS-HARDY M.R. The question raised by this appeal is whether land tax is payable by the plaintiffs in respect of so much of their tube as is beneath the half of certain streets in the city of London abutting on houses the land tax on which has been redeemed, it being admitted that land tax is not payable in respect of so much of the tube as is beneath the houses. The question is certainly difficult, and I think novel.

Land tax is charged upon all hereditaments of whatever nature or kind, and all persons "having or holding" any such hereditaments are to be charged with as much equality as possible by a pound rate. The sum assessed is to be levied by distress and sale. The tenants are required to pay the sums rated and to deduct out of the rent so much as the landlord ought to pay and bear. Where the tenant holds at a rack rent, the whole sum

(1) (1855) 4 E. & B. 549, 563. (2) (1800) 1 East, 64.

will thus be thrown upon the landlord. Where the tenant does not hold at a rack rent, the ultimate burden of the tax will rest upon the landlord and the tenant according to their interests. There is provision of a somewhat complicated nature for recovering from a fresh occupier the amount which could not in a previous year be recovered by distress by reason of the land being vacant so as to recoup those who have borne more than their fair share.

Land tax may be redeemed according to the assessment and rate for the year. The Commissioners contract, and on payment of the agreed sum the property comprised in the contract is freed from land tax and from all further assessments.

One of the instances given in the special case will suffice to illustrate the problem. In February, 1804, there is a certificate of a contract for redemption of 21*l.* 5*s.* 8*d.* land tax charged upon two messuages or tenements in Cheapside, the consideration being the sum of 780*l.* 7*s.* 9*d.* Consols, which was duly transferred to the Bank of England. On the one hand it is contended that the land tax was charged only on the two messuages, and Swinfen Eady J. has held this. On the other hand it is contended that it was charged also on a moiety of Cheapside. I agree that the only hereditaments exonerated by redemption are the hereditaments on which the tax redeemed was assessed.

Now it is important to observe that there is no suggestion of any separate assessment of a moiety of Cheapside. And, further, that in 1804 Cheapside was, and that in the present year the streets in the city of London are, like country roads in this sense, that the "streets" are not vested in any local authority. The entire ownership a centro usque ad cælum is vested in the owners of the adjoining houses. In the absence of evidence to rebut the presumption the owner of each house is owner of the street usque ad medium filum. It is often called a presumption of law, and I do not stop to consider whether it is more properly called a presumption of fact.

Various theories have been stated as to the origin of this presumption. In *Doe* v. *Pearsey* (1) Bayley J. said "the rule is

(1) 7 B. & C. 306.

C. A. 1911

CENTRAL LONDON RAILWAY v. CITY OF LONDON LAND TAX COMMISSIONERS.

Cozens-Hardy M.R.

founded on a supposition, that the proprietor of the adjoining land at some former period gave up to the public for passage all the land between his inclosure and the middle of the road." But this does not appear to me to be satisfactory, for the presumption extends equally to a stream which divides two properties: *Micklethwait* v. *Newlay Bridge Co.* (1), a case to which Bayley J.'s explanation would not apply. Moreover, it extends also to a road or stream which divides two parishes: see *Rex* v. *Inhabitants of Landulph.* (2) In *Doe* v. *Pearsey* (3) a different and more satisfactory explanation was suggested by Littledale J., who said: "We do not know the origin of these rights. In all probability the rule that the presumption is to be in favour of the owner of the adjoining land has arisen from its being a matter of convenience to the owners of adjoining land, and to prevent disputes as to the precise boundaries of property."

Whatever be the origin of the presumption, its existence cannot be disputed: see *Micklethwait* v. *Newlay Bridge Co.* (1) It is not a mere conveyancing presumption. It is a rule of construction that a messuage includes a moiety of the street or road in which it is situate. The messuage and the moiety of the street or road are one tenement. Some evidence must be forthcoming to establish a severance or the existence of two tenements. This applies to a contract to sell the house, to a grant of the house, and to a lease of the house. A remarkable instance in the case of a lease was where the landlord was allowed to distrain on a cart standing on the moiety of the road, as being on the demised premises: *Hodges* v. *Lawrance.* (4)

It applies also to a devise of the house. I cannot suggest any legal instrument to which the presumption would not apply. An inclosure award is not really an exception. For the roads set out under the award owe their existence to the Inclosure Act; and it depends upon the language of the Act and the award whether the lord of the manor has or has not been deprived of the soil for the benefit of the adjacent owners. It is conceded that the presumption may be rebutted, and the terms of the Act and award may suffice to rebut it. I am not aware of any decision

(1) (1886) 33 Ch. D. 133.
(2) (1834) 1 Moo. & R. 393.
(3) 7 B. & C. 309.
(4) (1854) 18 J. P. 347.

upon the point, but in my opinion the presumption would equally apply in favour of a person who acquires a title to the house under the Statute of Limitations.

Is there any reason for holding that the assessment of the house and the certificate of the contract for redemption are documents to which the presumption does not apply, and that they did not, as a matter of construction, include a moiety of the street? I can discover none. It is plain that the moiety of the street or road might be included without being expressly named. For example, "the manor of X," "all the estate of John Smith in the parish of Y." And I feel no doubt that "the Priory Farm" would include the soil of any roads running through the farm. A limited owner who redeems the land tax on the house gets a charge upon the property. It is not reasonable to suppose that his charge extends only to the outside of the wall of the house and not to the middle of the street. I do not feel pressed by the argument that a separate assessment of a street or road is seldom to be found.

The fact that the moiety of the road was of little or no value, having regard to the public rights over it, seems to tend in favour of its inclusion in the assessment. But it is a fallacy to assert that there can be no beneficial occupation of the street. The owner of the adjacent house has not only legal possession which enables him to restrain trespassers, but he has also rights which are or may be of value—for example, the right to make vaults or cellars under the street, or to grant licences for carrying wires over the street.

I am not aware of any authority adverse to the view which I have expressed. Much reliance was placed upon a sentence in Lord Watson's judgment in *Metropolitan Ry. Co.* v. *Fowler* (1), but I do not think it right to attribute to the dictum of that great judge the weight of a deliberate judgment upon a point not distinctly raised before him.

I do not consider it necessary to refer to the other instances set out in the special case, for if the presumption applies at all it was scarcely contended that any distinction could be drawn. The very careful judgment of Swinfen Eady J., supported as it is by

(1) [1893] A. C. 427.

C. A. 1911

CENTRAL LONDON RAILWAY v. CITY OF LONDON LAND TAX COMMISSIONERS.

the judgment of Farwell L.J., has made me hesitate as to the correctness of my view. But as I have arrived at a clear conclusion I feel bound to express it. In my opinion this appeal should be allowed. The costs will follow the event.

FARWELL L.J. This is an appeal from so much of an order of Swinfen Eady J. as declares that, "Where the land tax has been redeemed on lands, tenements, and hereditaments fronting, adjoining, or abutting upon a public street or highway, such redemption does not extend to the middle line of such street or highway or exonerate from the payment of land tax so much of the said railways and works as is situate under such street or highway"; and its determination depends ultimately on the question whether the presumption that a conveyance of land abutting on a highway passes the adjoining half of the highway applies to the assessment of land tax and the notification of redemption thereof founded on such assessment. It is necessary, however, before considering this to state the nature of land tax and the procedure for its redemption. The tax is a poundage rate assessable according to annual value upon manors, lands, &c., and all persons "having or holding" the same (38 Geo. 3, c. 5, s. 4), and recoverable from such persons and by distress on their goods and by distress on all goods found on the assessed premises (ss. 9 and 17), and this has been held to mean that it is a tax on the tenant in occupation, but with right of recourse by him against his landlord in proportion to the rent paid to him and against owners of fee farm rents, &c., charged on the assessed premises in proportion to the amounts of such fee farm rents or the like. It is a tax measured by annual value and payable primarily by the person in occupation, but ultimately by the persons beneficially interested in the annual value of the property assessed in proportion to their several interests. It is plain from Lord Mansfield's judgment in *Rex* v. *Inhabitants of Mitcham* (1) that under the Acts prior to 38 Geo. 3, c. 5, and from *Ward* v. *Const* (2), that under that Act the land tax as between landlord and tenant is not a landlord's but a tenant's tax; it is assessable on annual value, and its burden is divisible according to

(1) Caldecott, 276. (2) 10 B. & C. 635.

the division of the benefit of such value. It is therefore essential to an assessment that there should be a beneficial occupation either actual or potential in its existing state. I say "potential," because it appears to me (ss. 18 and 40) that where lands are vacant and the tax cannot be recovered the owners of the other lands in the area have to make up the deficiency, but a subsequent occupier of such vacant lands has to repay to them the sums so paid by them. It is also clear that the lands and tenements liable to be assessed are not confined to the surface, but may extend to property under the surface: *Metropolitan Ry. Co.* v. *Fowler* (1); but in my opinion lands which in their actual condition are incapable of beneficial occupation, although by alteration of such condition they may hereafter become so, are prima facie not assessable within the Act because there is no annual value on which the rate can be assessed and no benefit according to which the burden can be allocated. Take the case of the owner of a row of houses abutting on a street: he believes that in the near future the land under the street will be required by some undertakers and accordingly demises his house in express terms excluding the soil under the street. So long as such soil remains in situ undisturbed it would in my opinion be impossible for the Commissioners to assess it to land tax against the will of the owner, although I see nothing to prevent a value being assessed by agreement for the purpose of redemption or otherwise. It has neither annual value nor beneficial occupation, and as in *Leigh* v. *Jack* (2) Cotton L.J. held that there could be no discontinuance by absence of use and enjoyment where the land is not capable of use and enjoyment, so here there is no presumption of annual value where there is no possibility of use and enjoyment. The lessor has no doubt possession in law, but that is a very different thing from beneficial occupation. Take again a case like the present. It is said that the Commissoners never in fact assess land under a highway: could they amend their assessments on the occupiers of the adjacent houses by adding a sum in respect of the soil under the adjacent highway? I think certainly not. There is no basis on which such increase can be ascertained, and still less on which

(1) [1893] A. C. 416, 422. (2) 5 Ex. D. 274.

C. A. 1911

CENTRAL LONDON RAILWAY v. CITY OF LONDON LAND TAX COMMISSIONERS.

Farwell L.J.

its burden could be apportioned between landlord and tenant. This is in accordance with the opinion expressed by Lord Watson in *Metropolitan Ry. Co.* v. *Fowler.* (1) His Lordship says: "It was argued that the Act of 1797 applies only to the surface of land and to buildings erected upon it, and that, whenever the surface is taxed, or is exempted, as in this case, by reason of the use to which it is put, no tax is exigible in respect of buildings below the surface. I can find no solid foundation for that argument, either in principle or in the language of the Act. A construction in or below the land is as much a part of it as an erection on its surface. A cellar below a public footway is as much a tenement as the dwelling-house to which it is appurtenant; and I can see no reason for holding that, should they be severed in title, the one would not be as much a hereditament as the other. If the tax were redeemed by the owner of the land, at a time when there were no buildings upon it, I think that buildings subsequently constructed, whether above or below the surface, would be enfranchised." He assumes it to be clear that no tax is exigible in respect of land in situ under a street; for it would have been idle to discuss the question whether buildings subsequently built under the surface would become so if the land itself were so: it would have followed as a matter of course. Stirling L.J. takes the same view in *Westminster Corporation* v. *Johnson* (2), where he says: "The amount for which any particular piece of land is assessed may vary from year to year, according as its value decreases or increases relatively to the rest of the land in the district. It may even happen that the value may become nominal, in which case the property would in practice not be included in the assessment, and thus would in a sense cease to be assessable." The next point to be considered is the mode of redemption, and this is to be found, so far as is material for this case, in 42 Geo. 3, c. 116, s. 8, and 53 Geo. 3, c. 123, ss. 9 to 20 and the schedules to that Act. The material point is that the redemption is based on the last yearly assessment and is measured by so many years purchase thereof: the landowner puts the procedure in motion, and has to sign a declaration and to produce a full description of the property proposed to be exonerated, giving its area and boundaries

(1) [1893] A. C. 427. (2) [1904] 2 K. B. 747.

(see the forms given in Bourdin's Land Tax, 4th ed. pp. 107, 108), and the certificate of contract by the Commissioners is with the persons by or on whose behalf such declaration shall be signed for the redemption of the land tax therein named: ss. 10, 11, and 12.

The effect is that the landowner declares to the Commissioners that he desires to redeem the land tax on, e.g., messuage No. 1, Cheapside, in the occupation of B., which premises are assessed at X pounds. I agree with Swinfen Eady J.'s statement in the Court below at p. 474, whether it is or is not disputed at the Bar, that "The only lands exonerated by redemption are the lands on which the tax redeemed was assessed, and that the certificate of the contract is the proper evidence of what lands were assessed and are exonerated." It is for the landowner who asserts redemption to prove that the premises which he claims to have redeemed were included in the assessment which is the basis of the redemption: the onus is on the appellants, and they have not given any evidence of actual assessment, nor could they have proved any such, if we are to accept the statement made by Stirling J., and made also to us at the Bar, that the land under the street is never in fact reckoned in the assessment. I will not, however, assume that this is so, but will deal with the case on the footing that there is no evidence either way, so that the case will depend on the application of the rule of construction to which I have referred to cases of assessment and redemption under the Act. So far as I am aware that rule has never been applied to anything but grants and documents in the nature of grants: it is a mere rule of construction which yields to evidence of a contrary intention, and is founded on reasons which either have no application to the present case or, if they have, apply against the appellants. It is thus stated by Cotton L.J. in *Leigh* v. *Jack* (1), where he says: "This presumption is well known: it is assumed, in the absence of express evidence, that the adjoining owners have contributed to the formation of the road, and have dedicated it for the public benefit; it is reasonable, therefore, that when a man grants all his land or all his fields, he should be held to grant also the soil of such roads as may form the boundary of his property, usque ad medium

(1) 5 Ex. D. 273.

C. A. 1911

CENTRAL LONDON RAILWAY v. CITY OF LONDON LAND TAX COMMISSIONERS.

Farwell L.J.

filum viæ. But this doctrine depends upon a presumption which may be rebutted: it applies to existing roads: but no case has been cited where it has been held to extend to a conveyance of land adjoining a piece of land intended to be dedicated as a highway. I think that in such a case as that the grantor remains owner of the soil of the intended road": and see *Mappin Brothers* v. *Liberty & Co., Ld.* (1) So, too, in *Lord* v. *Commissioners for City of Sydney* (2) it is said: "If lands granted were described as bounded by a house, no one could suppose the house was included in the grant; but if land granted were described as bounded by a highway, it would be equally absurd to suppose that the grantor had reserved to himself the right to the soil ad medium filum, in the far greater majority of cases wholly unprofitable. This consideration shews that it never can be a question to be determined by the literal meaning of the words, without reference to the circumstances in which they are used." Then, after referring to the case before the Board, the judgment proceeds: "The Crown had the power of granting it; no reason can be assigned why it should have reserved what might be directly and immediately useful to the grantee, and could scarcely have been contemplated as of any probable use to the Crown, and this too in an infant colony, where it was the manifest and avowed policy to encourage settlement and the cultivation of land by grants on the easiest and most favourable terms." The rule is stated in the same way as a rule of construction of grants against grantors in *Berridge* v. *Ward* (3), and in *Simpson* v. *Dendy*. (4) The rule is a corollary of the rule for avoiding disputes between neighbours which assumes that the owners of land adjoining an ancient highway originally gave each a moiety of the land necessary to make the road which enured for their common benefit. When the original owners parted with the land abutting on the highway there would prima facie be no reason why they should retain the strip under the highway, and their grants, mortgages, demises, and like instruments are therefore construed against them as prima facie including such soil. But the rule is

(1) [1903] 1 Ch. 118.
(2) 12 Moo. P. C. 497, 498.
(3) 10 C. B. (N.S.) 400.
(4) (1860) 8 C. B. (N.S.) 433: see Willes J.'s judgment, 472.

a mere rule of construction and is so treated in all the text-books, including Lord Halsbury's Laws of England, Highways, vol. xvi. p. 52. In Dart on Vendors and Purchasers, 6th ed. at p. 602, it is stated: "Upon the sale of lands adjoining an ancient highway, the ordinary rule is, that the road usque ad medium filum viæ passes by the conveyance." In Sugden on Vendors and Purchasers, 14th ed. at p. 26, the rule is stated to be that where land adjoining a highway is conveyed, a moiety of the highway passes with it, although the land conveyed is in terms confined to the land. Norton on Deeds, p. 232, states the rule thus: "A conveyance of land abutting on a highway, or a non-tidal river, passes the adjoining half of the highway, or of the river bed." Indeed, in *Leigh* v. *Jack* (1) Cockburn C.J. says: "The presumption relied upon does not apply in the case of a recent grant or conveyance." Further, Inclosure Acts do not pass the soil under highways unless they can on construction be held to operate as grants. The Courts have in some cases been able so to construe the words of such Acts as to find something in the nature of grant and grantor therein, but apart from such application the rule does not apply to such Acts. In *Rex* v. *Inhabitants of Edmonton* (2), Lord Tenterden, in answer to the argument that the soil of the road according to the ordinary presumption belonged to the adjoining owners, said: "I should doubt whether that presumption would hold here, where the roads are made under an Inclosure Act," and directed the jury in accordance with that view. In *Poole* v. *Huskinson* (3), Parke B. says: "As to the ownership of the soil, I do not apprehend that there is any difficulty. It remains in the lord of the manor, for that portion of the soil only is taken from him for which he receives compensation, and which is allotted to others." In *Reg.* v. *Inhabitants of East Mark Tithing* (4) Patteson J. says: "If the learned judge had laid it down broadly and distinctly, that the lord of the manor was the owner of the soil, it would have raised the question, whether, under the inclosure act, the ownership of the soil remained in the lord of the manor or not, and upon that I have not much doubt"—obviously meaning that it

(1) 5 Ex. D. 270.
(2) (1831) 1 Moo. & R. 24, 32.
(3) (1843) 11 M. & W. 827, 830.
(4) (1848) 12 Jur. 332, 333.

C. A. 1911

CENTRAL LONDON RAILWAY v. CITY OF LONDON LAND TAX COMMISSIONERS.

Farwell L.J.

did remain so vested. I find nothing contrary to this in *Neaverson* v. *Peterborough Rural Council* (1) and *Haigh* v. *West* (2), both of which turned on the construction of long and intricate Acts of Parliament. In *Neaverson* v. *Peterborough Rural Council* (1) the Court took the view that the Act was a permanent scheme for the drainage of an area not merely for the benefit of the persons interested in that area, but as part of a large scheme for the drainage of a large district down to the sea, which scheme would be rendered nugatory on any construction other than that adopted by the Court. The question of the roads was only indirectly raised. In *Haigh* v. *West* (2) the Court found that there was a person competent to make and another person competent to take a grant, and read the Act accordingly as a grant to which the rule would of course apply. In *Reg.* v. *Strand Board of Works* (3) Cockburn C.J. says: "In conveyances and Acts of Parliament upon which questions of law have arisen, where land was conveyed, or a district constituted with specified boundaries, and one of them consisted of a highway or a river, we never find it described as the medium filum of the highway or river; and it is clear, especially since the case of *Berridge* v. *Ward* (4), that, if language like the present had appeared in an ordinary conveyance it would have been considered as including the land ad medium filum viæ"; and he then goes at length into the reasons for applying the rule to the Act of Charles II. which was then before the Court, and dealt with the division between parishes; but he treats the rule as confined to grants, and gives his reasons for treating the Act as if it were a grant, none of which have any application to the present case. In my opinion also a trespasser who acquires a possessory title to land or house abutting on a highway acquires no title to the soil of such highway; the commencement of his possession since the highway was made rebuts the presumption that he was the original maker, and he has nothing in the nature of grant from which any presumption of title in him can be inferred. His possession extends vertically, but not laterally. I fail to see the applicability of a rule of construction grounded on the reasons stated above to a case like the present.

(1) [1902] 1 Ch. 557.
(2) [1893] 2 Q. B. 19.
(3) (1863) 4 B. & S. 526, 547.
(4) 10 C. B. (N.S.) 400.

In a conveyance the grantor who wishes to reserve something which is of no apparent value to him and may well be supposed to be included in his grant ought to express his reservation in terms; but the converse applies to the case of an owner who is not granting but is retaining his lands and applying to public officials for its redemption. The duty then is on him to express in clear terms the particulars of the land that he desires to redeem. The Commissioners are not in the position of a grantor. They are acting in discharge of a public duty and exercising a power conferred on them by statute; the presumption is that they do not intend to allow gratuitous redemption, nor can it be said that the site of a street in the City is of no probable value for taxation purposes. Further, it is the assessment, not the certificate, which is the most material consideration, for if the subsoil was not in fact assessed the Commissioners have no power to allow redemption. But on what principle can it be said that the statement that a messuage is assessed at X pounds to the land tax prima facie implies that the subsoil of the adjacent street ad medium filum is also included in such assessment? The contrary appears to me to be the true presumption, because such land in situ is of no annual value and is incapable of beneficial occupation. There is therefore no datum for assessment.

I turn now to schedules C, D, and E of the case. Schedule C describes a "certificate of a contract dated the 3rd day of February 1804 whereby John Baker and William Thornburgh Brown Esquires two of the Commissioners appointed for the purposes of the said Act for the city of London and liberty of Saint Martin-le-Grand certified that they had contracted with John Walkden of Highbury Place Islington in the county of Middlesex Esquire for the redemption by him of £21 5*s*. 8*d*. land tax charged upon the two several messuages or tenements with the appurtenances hereinafter mentioned and described (that is to say):—One messuage or tenement with the appurtenances situate in Cheapside in Saint Mary-le-Bow precinct of the Ward of Cheap in the city of London in the occupation of Richard Clarke and charged with £16 14*s*. 5*d*. And one other messuage or tenement with the appurtenances situate in

C. A. 1911

CENTRAL LONDON RAILWAY v. CITY OF LONDON LAND TAX COMMISSIONERS.

Farwell L.J.

Cheapside in the said precinct and ward in the occupation of John Perrell and charged with £4 11*s.* 3*d.* Which premises are assessed in the assessment made for the said ward for the year 1803 as follows, viz.: Richard Clarke £16 14*s.* 5*d.* John Perrell £4 11*s.* 3*d.* Consideration"; and so on. It is conceded that the words "with the appurtenances" add nothing; land is not appurtenant to land, so that the simple statement that the messuage or tenement in Cheapside was assessed in the assessment made for the ward of Cheap for the year 1803 at £16 14*s.* 5*d.* is to be taken to mean that such messuage and the land under Cheapside adjoining usque ad medium filum was so assessed, a statement which is almost certainly incorrect unless the actual assessment of the messuage includes the non-existing assessment of the adjoining subsoil. The same observations apply to the next schedule, D, where the assessment was made for the ward of Farringdon in 1867. It appears to me impossible to suppose that any actual assessment of the subsoil was in fact made in 1803 or 1867, and I fail to see any reason why the Court should assume it. Schedule E appears to me to be even more unfavourable to the appellants, where they have shewn the premises assessed by a coloured plan. The company have themselves redeemed in this case, and they exhibit a plan shewing that the assessment was on the houses coloured and not on the subsoil of the adjacent street. How can they be heard to say that they intended and were entitled by the assessments to include such subsoil? and what relevancy to such a case has a rule that if they had granted away by such a description they could not be heard to say in the absence of some sufficient reason that they had not included the subsoil in such grant? It is in my opinion impossible to apply a rule of construction of grant in conveyances to the present case and so to compel the Court to hold that the subsoil in situ of a street in the city which in its condition at the date of redemption was incapable by itself of beneficial occupation and had no assessable value was in fact assessed and valued, and had therefore been redeemed, or to infer that the Commissioners neglected their duty by failing to assess something which is assessable but must be taken to have assessed it in fact. If they have assessed

it in fact it ought to have been stated in the assessment. If they had not assessed it they are right in not stating it as so assessed. It is said that this is inconsistent with Swinfen Eady J.'s judgment in the other part of the case, that the land actually beneath the houses was redeemed by the redemption of the houses, and with Bray J.'s decision as to minerals in *Newton, Chambers & Co.* v. *Hall* (1); but this is not so. No. 1, Cheapside or Blackacre, belonging to A. (unless there has been some working underground or some severance of title of surface and minerals), is a single tenement in one occupation including both subjacent soil and superambient ether usque ad cælum, but this is not so with subsoil under adjacent land. If such land be field or house it cannot be treated as one tenement with the house or field; if it be street it may include it on construction of a document as between grantor and grantee, or on the construction of a will; but it is not in fact or in nature, but only by construction of law in certain cases, part of the same tenement. If the surface has before redemption been severed from the minerals, or if the owner of the surface and minerals resides in the house and works the minerals, surface and minerals will be separate tenements occupied and assessable separately. It was suggested that if the tax were redeemed by a limited owner he would be entitled to a charge and that the rule would apply to such charge, but the charge is only on the property redeemed, and the measure of that is the property assessed, and that must be ascertained before any question of charge arises, nor is there any grantor in such a case within the meaning of the rule.

It was suggested also that the subsoil would pass by a devise of the messuage, and this may very well be not by reason of the rule, but because the Court would construe the will so as to give effect to the testator's expressed intention, and would doubtless think it absurd to suppose that a testator intended the subsoil under the street to go to his residuary devisee or devolve on his heir-at-law while the adjoining house went to the specific devisee. The Court has greater latitude in construing wills than deeds, and does not require the assistance of the reasons which underlie the rule as to conveyances.

(1) [1907] 2 K. B. 446.

C. A. 1911 — CENTRAL LONDON RAILWAY v. CITY OF LONDON LAND TAX COMMISSIONERS. — Farwell L.J.

I am therefore of opinion that although Blackacre in the hands of its owner is one tenement vertically ad cœlum et ad inferos, it has prima facie no lateral extension, but if one of its boundaries be a highway, then in the absence of evidence to the contrary such highway is presumed to have been made as to one moiety on Blackacre so far as it abuts thereon, and in all grants and documents in the nature of grants of Blackacre the soil of such highway will prima facie pass from the grantor to the grantee by the grant of Blackacre. The rule, however, is confined to grants and documents in the nature of grants, and the question whether the particular document, whether it be a deed or Act of Parliament or otherwise, is or is not in the nature of a grant depends on the construction of the document in each case, and that in the present case the assessment and certificate are not in the nature of grants, nor are the Commissioners grantors. I am, therefore, of opinion that Swinfen Eady J. was right, and that this appeal should be dismissed with costs.

KENNEDY L.J. This case raises a question which is certainly difficult and appears to be novel. Upon the whole I have come to the conclusion that the appeal ought to be allowed, for the reasons which have been stated by the Master of the Rolls, and which I desire to adopt. I see no sufficient ground for refusing to treat the presumption of ownership ad medium filum as applicable to this case. That presumption would, beyond question, have applied in the case of each of the redeemed properties in regard to conveyance of that property to a purchaser or mortgagee, or to the lease of that property to a tenant. Why should it not apply as between the owner and the Land Tax Commissioners? It appears to me that the contention of the respondents is based upon an implication, for which I am unable to find warrant either in law or in fact, of the independence as an assessable unit, of the soil between the owner's property so far as it adjoins the street and the soil ad medium filum. The property alike in regard to ownership and to tenancy is one, the soil in the street being in point of law (unless, of course, there is sufficient evidence to rebut the presumption) a part of the whole. It is quite true that the certificates do not in terms describe the

respective properties to which they relate as including this adjoining soil; if there had been such a description it would have put the respondents at once out of Court. But the description as it stands would prima facie in any legal document relating to the property inferentially include this adjoining soil. What ground is there for making an exception in the case of this legal document? Some stress was laid in the course of the respondents' argument before us upon the absence of actual beneficial occupation of the soil in question. But s. 40 of the Act of 1797 shews that lands and houses actually unoccupied may be assessed to the land tax. Waste of a manor was included in a contract of redemption in *Hodgson* v. *Pearson*. (1) That the soil in question is potentially capable of beneficial occupation is plain. The possessor of the adjoining premises to whom it passes by his lease might at any moment utilize it by excavating a cellar or underground room. Moreover, the land tax is not essentially an occupier's tax. It is a tax charged upon (inter alia) lands and tenements under s. 4 of the Act of 1797 and in the first instance, no doubt, payable by the occupier, but the amount paid by him is deductible by him from his rent, wholly or in part, according as he is or is not tenant at a rack rent; and the manifest intention and the working of the Act is to distribute the incidence of the tax between all those who derive pecuniary benefit from an interest in the lands or tenements: see Land Tax Act, 1797, s. 5, and *Rex* v. *Inhabitants of Mitcham* (2), and *Rex* v. *Inhabitants of Carshalton* (3) there cited. Having regard to the special character of the land tax, I do not myself see that much light is thrown upon the question before us by referring to the dicta of learned judges in poor rate cases such as *Hare* v. *Putney Overseers*. (4) "The land tax differs from the poor's tax. The landlord who receives the rent is to pay the land tax; but the poor's tax is payable by the occupier": per Lord Mansfield C.J., *Rex* v. *St. Luke's Hospital*. (5) Nor does the dictum of Lord Watson in *Great Eastern Ry. Co.* v. *Hackney*

(1) 31 L. T. 679.
(2) Caldecott, 276.
(3) Unreported.
(4) 7 Q. B. D. 223.
(5) (1760) 2 Burr. 1053 1064.

C. A. 1911 CENTRAL LONDON RAILWAY v. CITY OF LONDON LAND TAX COMMISSIONERS.

Board of Works (1), cited by Swinfen Eady J. with all respect, seem to afford us any assistance here. I understand that in the present case the street is not vested in any public authority, and the soil in question is potentially capable of beneficial occupation.

I agree, therefore, that the appeal should be allowed.

Solicitors: *Ashurst, Morris, Crisp & Co.; Harratt & Pollock.*

G. A. S.

SWINFEN EADY J. 1911 *May* 11, 12, 13, 15; *July* 13, 14, 25, 26, 27.

COPE *v.* BENNETT.

[1910 C. 3044.]

Probate — Administration Bond — Assignment — Practice — Summons before Registrar — Assignees — Representative Capacity — Right to sue in own Names — Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 83—*Court of Probate Act*, 1858 (21 & 22 *Vict. c.* 95), *s.* 3.

An order for the assignment of an administration bond under s. 83 of the Court of Probate Act, 1857, may be made by a registrar of the Probate Division on a summons.

In the Goods of Rees [1896] W. N. 57, followed.

Registrar's report on this practice adopted.

The assignees, though bound to hold all moneys recovered as trustees for all persons interested in the estate, need not sue in a representative capacity, but may sue simply in their own names.

Sandrey v. *Michell* (1863) 3 B. & S. 405, distinguished.

WITNESS ACTION.

This was an action to enforce an administration bond against the sureties, the administratrix having misapplied certain assets and otherwise broken the conditions of the bond and nothing being recoverable from her.

On October 21, 1910, the plaintiffs, Cope Brothers (who were also the plaintiffs in a creditors' administration action previously brought on behalf of themselves and all other creditors), obtained an order on summons before a registrar of the Probate Division for the assignment of the bond to them by name, and the bond was so assigned by the registrar on October 26. Notice of the assignment was given to the sureties, one of whom had attended before the registrar on the summons. The plaintiffs thereupon put the bond in suit in their own names against the sureties.

(1) 8 App. Cas. 687, 693.

They sued as Cope and Abrahams (trading in co-partnership as Cope Brothers), and merely stated (inter alia) in the body of their statement of claim that they would hold all moneys recovered as trustees for all the creditors. The defendants objected (inter alia) (*a*) that an order for the assignment of an administration bond could not be made by a registrar, and (*b*) that the plaintiffs could only sue in a representative capacity, and that the provisions of Order III., r. 4, had not been complied with. The arguments and judgment on these points are alone reported.

Hon. Frank Russell, K.C., and *Ashton Cross*, for the plaintiffs. Sects. 81 and 82 of the Court of Probate Act, 1857, provide that an administration bond is to be given to the judge of the Court. Sect. 83 provides that "The Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the Court to assign the same to some person, to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the Court, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond." It is clear therefore that the plaintiffs can sue in their own names, as if they were obligees of the bond, but must hold all moneys recovered in trust for all persons interested.

The registrar had jurisdiction to make the order for assignment. "The practice in these cases is for the applicant to issue a summons against the sureties, returnable before a registrar, to shew cause why an order should not be made directing the bond to be assigned. This is an alteration of the old practice, which was to apply by motion to the Court": Tristram and Coote's Probate Practice, 14th ed. (1906) p. 89. (1)

(1) This statement of the modern practice also appears in the 13th ed. (1900) p. 94; 12th ed. (1896) p. 106; and 11th ed. (1891) p. 106. The 10th ed. (1888) p. 106, states the old practice only, so that the change was apparently made between 1888 and 1891.

SWINFEN EADY J.
1911
COPE v. BENNETT.

Sect. 3 of the Court of Probate Act, 1858, provides that "It shall be lawful for the judge of the Court of Probate for the time being to sit in chambers for the dispatch of such part of the business of the said Court as can in the opinion of the said judge, with advantage to the suitors, be heard in chambers; . . . . provided always, that no question shall be heard in chambers which either party shall require to be heard in open Court," and s. 5 provides that "The judge . . . . when so sitting in chambers shall have and exercise the same power and jurisdiction . . . . as if sitting in open Court."

The jurisdiction of the Court of Probate is transferred to the High Court by s. 16 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), and s. 39 provides that "Any judge of the said High Court of Justice may, subject to any rules of Court, exercise in Court or in chambers all or any part of the jurisdiction by this Act vested in the said High Court, in all such causes and matters, and in all such proceedings in any causes or matters, as before the passing of this Act might have been heard in Court or in chambers respectively, by a single judge of any of the Courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorised to be so heard by any rules of Court to be hereafter made. In all such cases, any judge sitting in Court shall be deemed to constitute a Court."

Order LIV., r. 12, provides that "In the Queen's Bench Division a Master, and in the Probate, Divorce and Admiralty Division a registrar, may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Act or these rules may be transacted or exercised by a judge at chambers," with exceptions not material hereto. The registrar had therefore jurisdiction to make the order for assignment.

Hon. E. C. Macnaghten, K.C., and *Giveen*, for one surety. Sect. 83 enables the assignees to sue in their own names instead of in the name of the judge. But they can only sue as trustees for all persons interested in the estate: *Sandrey* v. *Michell* (1); and the capacity in which they sue ought to appear in the indorsement of the writ, or the title of the action: see

(1) 3 B. & S. 405.

Order III., r. 4, and the notes thereon in the Annual Practice, 1912, vol. i. p. 11.

An order for assignment under s. 83 of the Court of Probate Act, 1857, must be made by the Court. It cannot be made by a judge in chambers, still less by a registrar.

[SWINFEN EADY J. The Court could delegate the jurisdiction to a judge in chambers: *Smeeton* v. *Collier.* (1)]

That would require a rule to be made by the Rule Committee. Otherwise the judge in chambers would have no jurisdiction: *In re Davidson.* (2) Sect. 39 of the Judicature Act, 1873, does not enable a judge in chambers to do anything that he could not have done before the Act: *Baker* v. *Oakes.* (3) Sects. 3 and 5 of the Court of Probate Act, 1858, are general sections. They surely cannot enable the judge to transact all business in chambers. They cannot override the express language of s. 83 of the Court of Probate Act, 1857. Sect. 18 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), expressly preserves the Probate Court practice until altered or annulled: *In re Hailstone* (4); and that practice was by motion for a rule nisi calling upon the sureties to shew cause why the bond should not be assigned: *In the Goods of Young* (5); *In the Goods of Cartwright.* (6) There is no rule by which this practice has been altered.

Again, even if the judge in chambers can make these orders, the registrar cannot do so. The Rules of the Supreme Court do not apply at all in non-contentious business: *In the Goods of Caspari.* (7) By s. 2 of the Court of Probate Act, 1857, "common form business" includes (inter alia) "all business of a non-contentious nature . . . . not being proceedings in any suit." In *In the Goods of Cartwright* (6) it was held that an application to assign an administration bond was not a proceeding in an action within the Rules of the Supreme Court, 1875, Order LIII., rr. 2, 3 (now Order LII., rr. 2, 3), and the old practice prevailed. We submit that this business is non-contentious,

(1) (1847) 1 Ex. 457.
(2) [1899] 2 Q. B. 103.
(3) (1877) 2 Q. B. D. 171, 176.
(4) [1909] P. 118.
(5) (1866) L. R. 1 P. & M. 186.
(6) (1876) 1 P. D. 422.
(7) (1896) 75 L. T. 663.

SWINFEN EADY J.
1911
COPE v. BENNETT.

and therefore, even if we are wrong in saying that the judge in chambers has no jurisdiction, Order LIV., r. 12, is inapplicable, and the registrar has no jurisdiction.

J. W. Manning, for the other surety, adopted the same arguments.

Micklem, K.C., and *Douglas M. Hogg*, for a third party against whom the sureties claimed indemnity adopted the same arguments.

Hon. Frank Russell, K.C., in reply. In *Sandrey* v. *Michell* (1) the plaintiff was enforcing the bond in order to obtain payment of his own private debt, and declared accordingly. This was clearly wrong. He could only enforce it for the general benefit of the estate, as we are doing. There is no substance in this objection. As to the practice, s. 2 of the Court of Probate Act, 1857, contains no definition of contentious business, but we are informed at the office that these applications are treated as contentious. In *In the Goods of Rees* (2) Gorell Barnes J. held that "An application for the assignment of an administration bond should be made to a registrar."

SWINFEN EADY J. (after stating the facts). It is objected that as the action is really brought by the plaintiffs as trustees for all persons interested in the estate they must expressly sue in that capacity. This objection is not well founded. No doubt the plaintiffs could not sue on the bond to recover their own debt for themselves. They can only recover on the bond as trustees for all persons interested, and must hold all moneys recovered as assets to be applied in due course of administration. In *Sandrey* v. *Michell* (1) it was decided that an administration bond could only be enforced for the general benefit of the persons interested in the estate, and not for the payment of a particular debt. In that case Cockburn C.J. and Wightman and Crompton JJ. all pointed out that the plaintiff was really suing for his own debt and not for the general benefit of the estate. In the present case the plaintiffs are clearly suing for the benefit of the estate generally, and will hold all moneys recovered as assets to be dealt with in due course of administration. This objection therefore fails.

(1) 3 B. & S. 405.

(2) [1896] W. N. 57.

The main objection is that the bond was not properly assigned, the order for assignment having been made by the registrar on summons and not by the judge in Court. This objection is answered by *In the Goods of Rees* (1), which was cited at the close of the arguments. In that case Gorell Barnes J. held that "An application for the assignment of an administration bond should be made to a registrar." Moreover, this has been the practice for a considerable period: see Tristram and Coote's Probate Practice, 14th ed. pp. 89, 295. Under the Court of Probate Act, 1858, s. 3, the judge is entitled to sit in chambers for the dispatch of such part of the business as can in his opinion with advantage to the suitors be heard in chambers, "provided always that no question shall be heard in chambers which either party shall require to be heard in open Court." In the present case the sureties, on being summoned to shew cause why the order for assignment should not be made, took no objection to the matter being heard in chambers. As, however, the point was strenuously argued I consulted the President during the course of the trial as to the present practice of the Probate Division in making orders for the assignment of administration bonds. The President consulted Mr. Registrar Hardy, who reported to him as follows:—

"Principal Probate Registry, Somerset House,

May 16, 1911.

"Assignment of Bond.

"These orders have been made by a registrar on summons for a very long time, and the statements on pp. 89 and 295 of Tristram and Coote, 14th ed., recognize the practice. I have before me a note made by the late senior registrar, Mr. Owen, for Sir Francis Jeune on June 27, 1894, in which he includes these summonses for assignment of bonds as part of a list to be furnished by the President to the Rule Committee. That they were then adopted by the Rule Committee as part of our practice is evident from the fact that the practice has continued ever since as it was before. There appears to be no doubt that the President can delegate matters to the registrars, and especially non-contentious matters, which are so easily and satisfactorily

(1) [1896] W. N. 57.

SWINFEN EADY J.
1911
COPE v. BENNETT.

dealt with over here. The practice, it is believed, prevailed long before the presidency of Sir Francis Jeune, so that what he did was to confirm a useful practice. If, however, no distinct origin of earlier date can be traced, the correspondence between him and the senior registrar and the subsequent practice could be treated as the creation of the practice. In the same way your Lordship could either adopt the convenient practice of delegating these matters to the registrars, or affirm the practice which has long obtained. There are other matters in Mr. Owen's list which without doubt were originally only dealt with by the Court. All these went before the Rule Committee and have been ever since dealt with by the registrars."

It is therefore the settled practice of the Probate Division for these matters to be dealt with by a registrar on summons. In the present case the objection is purely technical, as there was no reason why the bond should not be assigned. The plaintiffs are therefore entitled to sue.

[His Lordship then dealt with the rest of the case, and with the third party notice.]

Solicitors: *Coburn & Co.; Cohen & Cohen; John Tucker; C. O. Humphreys & Son.*

G. R. A.

ATTORNEY-GENERAL *v.* LEWES CORPORATION.

SWINFEN EADY J.

1911

July 6, 7, 10, 11, 12, 13, 31.

[1910 A. 1090.]

Stream—Pollution—Sewage — Local Authority — "Stream" or "Sewer" — Intermittent Stream—No Summer Flow—Tidal Tributary—Deposit of Sewage on Banks—Public Nuisance—Old Culvert over Part of Stream—Non-maintenance of Culvert—Flooding of Private Land — Continuous Injury—Damages—Injunction—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 17, 19, 299—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

The discharge of sewage into the channel of an intermittent stream may have the effect of converting it into a sewer although the natural flow of the pure water is not cut off. No rule to the contrary is established by *West Riding of Yorkshire Rivers Board* v. *Reuben Gaunt & Sons, Ld.* (1902) 67 J. P. 183, or *West Riding of Yorkshire Rivers Board* v. *Preston* (1904) 69 J. P. 1.

Crude sewage was discharged by a local authority into the channel of an intermittent stream which ran in an old culvert through private land and then in the open air alongside that land to a tidal river, the stream itself being tidal up to the point where the sewage entered. The local authority had not interfered with the natural flow of the stream, which only ran during the winter. In the summer the channel conveyed nothing but sewage with the exception of the tidal water with which it was diluted twice a day. Sewage was deposited on the banks of the open channel to such an extent as to constitute a public nuisance when the tide was out, and owing to the defective state of the culvert the land was constantly flooded with pent up sewage water at spring tides.

In an action by the tenant of the land and the Attorney-General at his relation for damages and an injunction:—

Held, (*a*) that notwithstanding the summer flow of fresh water and the daily flow of tidal water the channel was a sewer.

(*b*) That the periodical inundation of sewage from a sewer out of repair was a continuing cause of action, and that the relator's right to damages was not limited by the Public Authorities Protection Act, 1893, s. 1, to damages in respect of the floodings within six months before action.

(*c*) That the local authority were liable to an injunction restraining them from occasioning a nuisance by discharging crude sewage through the open channel, and from discharging it or permitting it to flow from the culvert or sewer on to the relator's land.

Semble. Although s. 299 of the Public Health Act, 1875, provides a statutory remedy by complaint to the Local Government Board in the case of a local authority making default "in the maintenance of

SWINFEN EADY J.

1911

ATTORNEY-GENERAL. v. LEWES CORPORATION.

existing sewers" it does not preclude a private individual from obtaining damages and an injunction against that local authority in respect of a common law nuisance arising from that default.

WITNESS ACTION.

This was an action by the Attorney-General at the relation of Major Eckford, who joined as co-plaintiff. The defendants were the Lewes Corporation, who were incorporated on June 17, 1881, and were the urban authority within the Public Health Act, 1875, for the borough of Lewes.

Since March 22, 1909, the plaintiff Eckford had been the lessee and occupier of Leighside Hall and certain lands adjoining thereto in the borough, which he cultivated and used as a market garden.

A small natural stream called the Winterbourne rose about two miles west of the borough and flowed open to the air in an easterly direction. About 200 yards west of Eckford's land it entered a culvert and flowed underground in an easterly direction under the London, Brighton and South Coast Railway, and for about 300 yards under the southern portion of Eckford's land. At or near the south-eastern corner of the land the stream emerged from the culvert and flowed open to the air in a northerly direction, forming the eastern boundary of Eckford's land and passing within about forty yards of the house. It then flowed east and discharged into the tidal river Ouse about 150 yards from the house. The stream itself was tidal and tide locked at high tide.

The stream was an intermittent stream. In the ordinary course it broke out in the autumn after the October rains and ran during the winter until the spring. About May it usually ceased flowing, and the bed was dry until the late autumn. This was the usual condition, though it might flow in a very wet summer, or fail to flow in a very dry winter.

The plaintiffs alleged that the defendants had constructed sewers and required many houses to be connected with those sewers for the purpose of conveying the sewage into the culvert and stream and (in breach of s. 17 of the Public Health Act, 1875) were causing large quantities of sewage and filthy water to be discharged into the culvert and stream at the south-western

corner of Eckford's land without the same having been in any way freed from excrementitious or other foul or noxious matter such as would and did in fact affect or deteriorate the purity and quality of the water in the culvert and stream. They also alleged that by reason of the discharge of sewage and filthy water the stream was foul and polluted, gave off foul, noxious, and offensive odours, and was dangerous to the health of the neighbourhood and a public nuisance. They also alleged that at times of heavy rainfall the stream overflowed and flooded Eckford's land with filthy water and crude sewage.

Alternatively they alleged that from the point where the sewage was discharged into it and down to the river Ouse the stream was a sewer and as such was vested (under s. 13) in the defendants as the urban authority, and it was their duty (under s. 19) to cause it to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied, which duty they had not performed. They also alleged that the culvert was in a leaky and broken condition and sewage and filthy water escaped on to Eckford's land. They also alleged that Eckford had suffered damage by reason of the matters complained of.

The plaintiffs claimed—

1. A declaration that the defendants were not entitled to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into the stream until such sewage or filthy water was freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream;

2. An injunction in the terms of this declaration;

3. An injunction restraining the defendants from causing a nuisance and polluting the stream by discharging or causing to be discharged into it sewage or filthy water;

4. Alternatively a declaration that the stream from the point where sewage was discharged into it was a sewer vested in the defendants; and

5. An injunction restraining the defendants from keeping that sewer so as to be a nuisance or injurious to health.

The plaintiff Eckford also claimed damages.

SWINFEN EADY J.
1911
ATTORNEY-GENERAL v. LEWES CORPORATION.

The defendants admitted that they had constructed a sewer in 1895 and caused it to discharge a small quantity of sewage into the stream, but they alleged that the stream was already foul and polluted and that the purity and quality of the water was not affected or deteriorated by their discharge. They denied that it gave off foul, noxious, or offensive odours, or was dangerous to health or a public nuisance. If there had been any overflow, which they denied, it was not due to their default. They denied that any part of the stream was a sewer or vested in or repairable by them. They denied that they were responsible for the condition of the culvert, or that it was in a leaky or broken condition, or that sewage or filthy water escaped therefrom on to Eckford's land or at all.

In the alternative they said that so far as the plaintiffs' claim was based on improper maintenance of the alleged sewer it was bad in law, and the plaintiffs' only remedy (if any) was by complaint to the Local Government Board under s. 299 of the Public Health Act, 1875. They also said that they could not prevent the discharge of sewage into the stream until they had provided another outfall, and that they had prepared and submitted a scheme for that purpose to the Local Government Board. They relied on the Public Authorities Protection Act, 1893, s. 1.

They also relied on the fact that Eckford was a tenant of the railway company, the owners in fee of the Leighside estate, and alleged that the sewage discharged into the stream and culvert was so discharged with the consent of the railway company by culverts made by them as part of the works sanctioned by their private Acts of 1884 and 1890, this consent being given or implied by making the culverts. They relied on the railway company's acquiescence and submitted that their tenant was bound by it. They also said that they had discharged their sewers into the stream for twenty years before action brought and had acquired a prescriptive right.

The defendants had also given notice of their intention to rely on the following agreements under which the original culvert was constructed.

By an agreement dated August 17, 1868, and made between

Godlee, the owner of Leighside, and the Lewes Paving Commissioners acting under the 46 Geo. 3, c. xliii., reciting that Godlee was the owner in fee of Leighside in the parishes of All Saints and Southover in Lewes and that the Winterbourne stream ran through the land and was made use of by the commissioners for the purpose of drainage and that the commissioners were desirous of constructing a sewer along the western side of the stream between the points C and B on the plan in the margin thereof (the point C being on the western boundary of the land) and Godlee had consented to its construction on the conditions thereinafter contained, it was agreed that the commissioners might construct and maintain a sewer from the point C to the point B, that sewer to be constructed of brickwork nine inches in thickness and having an internal vertical diameter of three feet and a horizontal diameter of two feet, and might discharge the sewage conveyed along that sewer into the stream at or near the point B, and Godlee should hold the commissioners harmless against any damage he might sustain by reason of any nuisance occasioned to him thereby. The commissioners were to deepen the bed of the stream to such a depth and for such a distance above and below the point B as might be necessary for carrying off the sewage. The agreement was not to be construed to extend to allow the parish of Southover to convey its sewage into this drainage system, nor to allow the commissioners to connect any of the sewers for the drainage of the northern and eastern parts of Lewes not then draining into the stream with this new sewer. Immediately on the completion of the sewer the commissioners were to arch over the stream with brickwork nine inches in thickness for 100 yards from the point B in an easterly direction and were at all times thereafter to maintain the sewer and arch in good repair.

The stream between the points C and B had been previously culverted.

The Southover sewer authority having failed to provide a proper drainage system for their district, Conybeare was appointed by the Secretary of State in pursuance of the Sanitary Acts, 1866 and 1868 (29 & 30 Vict. c. 90; 31 & 32 Vict. c. 115), and the Sewage Utilization Acts, 1865 and 1867 (28 & 29 Vict.

SWINFEN EADY J.
1911
ATTORNEY-GENERAL v. LEWES CORPORATION.

c. 75; 30 & 31 Vict. c. 113), to perform the duty in which the Southover sewer authority had made default.

By an agreement dated May 21, 1870, and made between Conybeare and Godlee, reciting that Conybeare had notified to Godlee his intention to construct a main sewer or drain through his land, and that Godlee in consideration of 600*l.* to be paid to him had agreed to allow the contents of the said drain or sewer to be discharged into the Winterbourne stream and to forgo all further claim or demand for compensation, Godlee agreed at his own expense to construct a substantial arching over so much of the stream passing through the Leighside estate as should be requisite to prevent any nuisance consequent upon the discharge of the sewer or drain into the stream, and to accept the said sum of 600*l.* in full satisfaction for any claims or demands he or his tenants might have or claim against Conybeare for any loss or injury occasioned by the construction of the sewer or carrying out the said drainage works.

The evidence shewed that the culvert was constructed under these two agreements, and it ended at the present outlet. The Southover sewer was duly constructed, and thenceforward the Southover sewage as well as the sewage from the district comprised in the 1868 agreement was discharged into the stream at or about the point B.

On June 17, 1881, the Lewes Corporation were incorporated and the Southover district was included within the boundaries of the borough.

In 1884 the railway company obtained parliamentary powers to construct a new line and to alter their Lewes station under the London, Brighton and South Coast Railway (Various Powers) Act, 1884 (47 & 48 Vict. c. xcvii.). This Act incorporated the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20). On March 2, 1885, they purchased the Leighside estate from the trustees of Godlee's will. In 1887 they diverted part of the sewer and culvert under their statutory powers and enlarged and rebuilt that part a little to the north of the former position. They had gone a little outside their limits of deviation, but their acts were confirmed by the London, Brighton and South Coast Railway (Various Powers) Act, 1890 (53 & 54 Vict. c. cxlviii.), s. 30.

On March 20, 1894, the borough surveyor made a report as to the drainage of High Street, Southover, and Priory Street, Priory Crescent, and Grange Road, Lewes, advising the construction of a new intercepting sewer with subsidiary sewers. This report was adopted by the town council in 1895. The intercepting sewer was constructed and received the contents of the subsidiary drains and sewers and led all the sewage to the point where it was discharged into the culvert.

About 690 houses in All Saints and Southover parishes giving a dry weather flow of sewage of 100,000 gallons a day now drained into the culvert, and there was evidence that six times the dry weather flow was reckoned as the amount of sewage flow requiring treatment. During the flow of the tide the tidal water passed from the river Ouse up the open channel and up the culvert. At spring tides the water rose considerably above the top of the culvert at the outlet and the flow extended through the culvert to a point a little west of Station Road. At neap tides the flow extended halfway up the culvert. At the point of discharge into the river the flow of each tide lasted about three hours, the water running down for the other nine hours. The result of the flow meeting the sewage coming down was to wash the sewage back to the open channel and pen it back in the culvert; and when the tide receded solid fæcal matter was deposited on the sides, slopes, and banks of the channel.

Dr. Alexander Foulerton, the county medical officer of health for East Sussex, visited the place twice last May on the ebb tide. He saw the sewage flowing steadily down, a black offensive fluid containing solid matter, excreta, paper, and so on, not differing in any way from ordinary sewage flowing out of an acknowledged sewer. It gave out an offensive penetrating smell; the whole of the bank at the side of the channel was coated with sludge which would be injurious to the health of persons living in the neighbourhood and a source of danger if carried by dust or flies or any similar agency. Eckford gave similar evidence, and in the opinion of the Court it was established (notwithstanding the evidence adduced by the defendants) that the open channel (when the tide was out) was in such a disgusting condition as to be a public nuisance.

SWINFEN EADY J.
1911
ATTORNEY-GENERAL v. LEWES CORPORATION.

Eckford entered into occupation of Leighside Hall in March, 1909, and in October, 1909, his grounds were flooded and his house invaded by sewage water which left a deposit of offensive black slime when the water went down and did him considerable damage. This had constantly recurred since at spring tides. His case was that the culvert was much out of repair and that the spring tides washed the sewage in the culvert through the apertures and cracks on to his premises, and this was fully established by the evidence.

Macmorran, K.C., and *H. G. Robertson*, for the plaintiffs. This stream is a sewer. When dry the channel conveys nothing but sewage. When flowing the stream is largely sewage. Of course the mere fact that sewage goes into a stream does not make it a sewer, but if the volume of sewage is so great compared with its natural flow that any one looking at it would call it a sewer, it is a sewer: *Falconar* v. *South Shields Corporation* (1); *Newcastle-upon-Tyne Corporation* v. *Houseman* (2); *West Riding of Yorkshire Rivers Board* v. *Reuben Gaunt & Sons, Ld.* (3); *West Riding of Yorkshire Rivers Board* v. *Preston.* (4)

Even if the stream is still a natural stream the defendants could be restrained from discharging crude sewage into it in breach of s. 17 of the Public Health Act, 1875, which, though in the form of a proviso, is really a prohibitory section: *Durrant* v. *Branksome Urban Council.* (5) But in that case the defendants would not be liable to keep the culvert in repair, because it would not be vested in them. We therefore ask the Court to hold that the stream is in fact a sewer.

The defendants say the basis of our complaint is that they have "made default . . . . in the maintenance of existing sewers" and that our only remedy is to apply to the Local Government Board under s. 299. That section would no doubt stand in our way if we were seeking for a mandamus to compel the defendants to "keep in repair all sewers belonging to them" under s. 15: *Pasmore* v. *Oswaldtwistle Urban Council.* (6) But that is not our

(1) (1895) 11 Times L. R. 223.
(2) (1898) 63 J. P. 85.
(3) 67 J. P. 183.
(4) 69 J. P. 1.
(5) [1897] 2 Ch. 291, 301.
(6) [1898] A. C. 387.

application. We are applying under s. 19, which provides that "Every local authority shall cause the sewers belonging to them to be constructed covered ventilated and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied." This is not within s. 299—*Baron* v. *Portslade Urban Council* (1)—and we are entitled to an injunction to restrain the defendants from keeping the sewer so as to be a nuisance or injurious to health. Eckford's claim for damages will certainly lie, as s. 299 does not empower the Local Government Board to award damages. The Public Authorities Protection Act, 1893, s. 1, does not apply, as the injury, i.e., the nuisance, is still continuing.

The acquiescence of the railway company is no answer to the Attorney-General's claim in respect of public nuisance, or under s. 17 of the Public Health Act, 1875, and the defendants cannot have obtained a prescriptive right to break the law. The diversion of the culvert by the railway company did not affect its status. If it was a sewer, it remained a sewer vested in the defendants, who are liable under s. 19. If it was a stream they are liable under s. 17. There is some point to be raised on the Godlee agreements, but we cannot deal with that point till we know what it is.

Hon. E. C. Macnaghten, K.C., and *Fleetwood Pritchard*, for the defendants. The agreement of 1868 under which the Lewes sewage was put into the stream is binding on Eckford as tenant of Godlee's successors, though of course it does not affect the Attorney-General. The actual 100 yards of culvert from the point B eastward that our predecessors covenanted to repair no longer exists. It was included in the part diverted by the railway company. We cannot be liable to repair the new part.

[SWINFEN EADY J. You would be liable to repair it, if a sewer.]

We should be liable under the statute, not under the covenant to repair, and Eckford claiming under Godlee would be estopped from enforcing any such statutory obligation. The Southover sewage was put into the stream under the agreement of 1870, which again is binding on Eckford though not on the Attorney-General. The rest of the old culvert to its present outlet was

(1) [1900] 2 Q. B. 588.

SWINFEN EADY J.
1911
ATTORNEY-GENERAL v. LEWES CORPORATION.

constructed by Godlee, who was paid 600*l.* This agreement contains no covenant to repair, and even if the culvert is a sewer Eckford cannot enforce any statutory rights.

[SWINFEN EADY J. The agreements merely allow you to put your sewage into the stream, not to let it escape on to Eckford's land.]

We submit that the agreements cover all consequences of our putting the sewage into the stream. Eckford must look after his own stream and protect himself. His common law right to restrain what would otherwise be a trespass under *Jones* v. *Llanrwst Urban Council* (1) is barred by the agreements. As to damages, Eckford's claim, if not barred by the agreements, must clearly be limited to the floodings within six months before action: Public Authorities Protection Act, 1893, s. 1.

We have now to deal with the Attorney-General's case. That is based on public nuisance, breach of the Public Health Act, 1875, s. 17, and non-repair of an alleged sewer. Now the stream and culvert are on private land cut off by the railway from all public access, and neither the flooding nor the condition of the stream, though possibly a nuisance to Eckford, constitutes a public nuisance.

Again s. 17 is a forbidding section in the nature of a proviso to the earlier sections of the Public Health Act, 1875. It is not a general prohibition, and it only applies where a local authority is using the powers of the Act: *Glossop* v. *Heston and Isleworth Local Board* (2); *Attorney-General* v. *Dorking Union* (3); *Earl of Harrington* v. *Derby Corporation.* (4) But the agreements with Godlee were before the Act. In 1868 our predecessors agreed with Godlee under their own private Act, and we are not responsible for the agreement of 1870 at all, as it was made not with our predecessors but with Conybeare, an officer of the Government. When we came on the scene the drainage into the stream was already authorized, and all we have done is to connect a new sewer in the authorized area. In making our new sewer we no doubt used the powers of the Act, but the outfall was already authorized. There is no reported case in which s. 17 has been applied to a tidal tributary.

(1) [1911] 1 Ch. 393.
(2) (1879) 12 Ch. D. 102.
(3) (1882) 20 Ch. D. 595.
(4) [1905] 1 Ch. 205.

If the culvert is a sewer we only used it as we found it. We cannot stop it. We cannot prevent authorized persons draining into it, nor can we be compelled to bring actions against unauthorized persons (if any). As far as the use of the culvert for sewage is concerned we are powerless, and the plaintiffs have no right of action: *Glossop* v. *Heston and Isleworth Local Board* (1); *Attorney-General* v. *Dorking Union* (2); *Brown* v. *Dunstable Corporation* (3); *Earl of Harrington* v. *Derby Corporation*. (4)

Our duty to maintain a sewer can only be enforced under s. 299: *Pasmore* v. *Oswaldtwistle Urban Council*. (5) Maintenance clearly includes the duty to "keep in repair" under s. 15, and if and so far as s. 19 includes repairing s. 299 applies. *Baron* v. *Portslade Urban Council* (6) merely decided that s. 299 did not include cleansing.

[SWINFEN EADY J. Sect. 299 provides no remedy for past damage.]

That is so. But if a plaintiff might bring constant actions for damages, s. 299 would be nugatory.

The main question is whether the stream is a sewer at all. We have not interfered with the natural flow of the water. We have only put sewage in. It is true that in summer the natural flow stops. But a very large quantity of tidal water flows in at each tide. The spring tides go right through the culvert. The neap tides go halfway through, just above the point where the sewage enters, so that the sewage is always well diluted and washed out of the culvert.

In *Pentney* v. *Lynn Paving Commissioners* (7) a tidal fleet though offensive and injurious to health by the discharge of sewage was held not to be a sewer within the limits of a special Act. There was, however, no stream at all in that case, and it throws very little light on the present question.

In *Newcastle-upon-Tyne Corporation* v. *Houseman* (8) it was merely decided that a tidal stream was a sewer within the

(1) 12 Ch. D. 102.
(2) 20 Ch. D. 595.
(3) [1899] 2 Ch. 378.
(4) [1905] 1 Ch. 205.
(5) [1898] A. C. 387.
(6) [1900] 2 Q. B. 588.
(7) (1865) 12 L. T. 818.
(8) 63 J. P. 85.

SWINFEN EADY J.
1911
ATTORNEY-GENERAL v. LEWES CORPORATION.

definition of a special Act which included a "channel for the passage of water." *Falconar* v. *South Shields Corporation* (1) is very shortly reported, but it appears from the judgments of Lord Alverstone in *West Riding of Yorkshire Rivers Board* v. *Reuben Gaunt & Sons, Ld.* (2) and *West Riding of Yorkshire Rivers Board* v. *Preston* (3) that in *Falconar's Case* (1), in which he was counsel, the natural flow of the stream had been cut off. The culverting, unless done by the local authority in order to turn the stream into a sewer, is immaterial, and unless the natural flow has been substantially cut off it is not a sewer: *West Riding of Yorkshire Rivers Board* v. *Reuben Gaunt & Sons, Ld.* (2); *West Riding of Yorkshire Rivers Board* v. *Preston.* (3)

[SWINFEN EADY J. Can you call a channel that in summer conveys nothing but sewage a natural stream?]

It is a natural stream though intermittent. Suppose there were no present drainage system, and we were now to construct sewers under the Public Health Act, 1875, s. 17 would obviously prevent us from conveying crude sewage into the Winterbourne above the point where it is tidal. We could not say it was not a natural stream. In the present case the fact that it is tidal and the large flow of tidal water really prevent the stream becoming a sewer.

Macmorran, K.C., in reply. Under the Sewers Utilization Act, 1865 (28 & 29 Vict. c. 75), s. 3 and schedule, the paving commissioners became the sewer authority, and by s. 4 they were to have the powers of local boards in respect of sewers under the Public Health Act, 1848 (11 & 12 Vict. c. 63), ss. 45, 46, the Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 30, and the Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), s. 4. But s. 4 of the last Act contained a similar provision to s. 17 of the Public Health Act, 1875. The agreements of 1868 and 1870 were therefore illegal, and there is nothing to prevent Eckford asserting his statutory rights. But assuming the agreements were lawful, Godlee merely authorized the sewage to be put into the stream. He certainly never intended to relieve the local authority from the burden of

(1) 11 Times L. R. 223. (2) 67 J. P. 183.
(3) 69 J. P. 1.

keeping it off his land. Now, even if the stream is a natural stream, the defendants are liable in trespass for allowing their sewage to escape on to Eckford's land: *Foster* v. *Warblington Urban Council* (1); *Hobart* v. *Southend Corporation* (2); *Owen* v. *Faversham Corporation* (3); *Jones* v. *Llanrwst Urban Council.* (4)

If, however, as we contend, the stream with its culvert is a sewer, we are entitled under s. 19 of the Public Health Act, 1875, to have it "kept so as not to be a nuisance or injurious to health." We are entitled to an injunction for the future and damages for the past. The defendants contend that this is "maintenance" within s. 299. But "the maintenance of a sewer is not the same thing as that which it is the duty of the local authority to do by virtue of s. 19—that is, to keep the sewer so that it shall not be a nuisance or injurious to health": *Baron* v. *Portslade Urban Council.* (5) Sect. 19 applies to the physical condition of the sewer: *Earl of Harrington* v. *Derby Corporation.* (6)

[SWINFEN EADY J. A better answer to the defendants' contention is that s. 299 gives no remedy in damages.]

Finally, this is a continuing injury to which the Public Authorities Protection Act, 1893, s. 1, does not apply: *Earl of Harrington* v. *Derby Corporation* (6); *Hague* v. *Doncaster Rural Council.* (7) We therefore ask for damages for all the floods as well as an injunction in the terms of s. 19.

[SWINFEN EADY J. The defendants have a scheme which will free the culvert of sewage.]

That would cover the breach of s. 17. But the culvert would still be a sewer even if it only conveyed surface water. *St. Leonards, Shoreditch, Vestry* v. *Phelan.* (8) Flooding would still take place, and the defendants, in whom the sewer would still remain vested, must keep it so as not to be a nuisance. We therefore ask for an injunction under s. 19.

Cur. adv. vult.

(1) [1906] 1 K. B. 648.
(2) (1906) 75 L. J. (K.B.) 305.
(3) (1908) 72 J. P. 404.
(4) [1911] 1 Ch. 393.
(5) [1900] 2 Q. B. 588, 590.
(6) [1905] 1 Ch. 205.
(7) (1908) 73 J. P. 69.
(8) [1896] 1 Q. B. 533.

SWINFEN EADY J.
1911
ATTORNEY-GENERAL v. LEWES CORPORATION.

July 31. SWINFEN EADY J., after stating the facts and holding that the open channel when the tide was out was in such a disgusting condition as to be a public nuisance, and also holding that the flooding of Eckford's land was caused by the defective culvert, continued: The question then arises, is the culvert a sewer? The plaintiffs contend it is. The defendants dispute it. The mere pollution of a natural stream or watercourse by turning sewage into it does not convert it into a sewer. On the other hand, if the watercourse has become substantially a sewer, the fact that at certain periods of the year clean water flows into it will not in my opinion prevent it from being a sewer. The question is one of fact and degree in each case. See *Falconar* v. *South Shields Corporation*. (1) In that case Lindley L.J. pointed out that the stream had changed its character completely and had become a sewer in the ordinary sense of the word, i.e., a channel for the reception and carrying away of sewage. It was a dirty, filthy sewer. This description exactly applies to the culvert. From May to October it is certainly a sewer in the ordinary sense—receiving the sewage to which I have referred, and in my opinion receiving substantially nothing but sewage. The fact that the tide flows into the culvert and out again can make no difference. From May to October the culvert, so far as regards the flow in it, is in no way different from the acknowledged sewers of the borough. In my judgment the fact that the winter flow of the Winterbourne passes through the culvert and mixes with the sewage does not prevent the culvert from now being a sewer. It is quite different from the case of sewage being led into a natural stream always flowing.

It was urged on behalf of the defendants that a stream cannot become a sewer unless all flow of pure or natural water be entirely cut off from it, but in my judgment this argument is not well founded, and the cases of *West Riding of Yorkshire Rivers Board* v. *Reuben Gaunt & Sons, Ld.* (2) and *West Riding of Yorkshire Rivers Board* v. *Preston* (3) do not establish it.

The result is that the culvert being a sewer the defendants are liable in damages to Eckford. The periodical inundation of

(1) 11 Times L. R. 223. (2) 67 J. P. 183.
(3) 69 J. P. 1.

sewage from a sewer still out of repair is a continuing cause of action.

I have carefully considered the amount of damages which Eckford has sustained, and I assess the amount up to this date at 495*l.* The defendants must pay the costs of the action.

I have considered the question of granting an injunction. Having regard to the sewerage scheme which the defendants have in hand, I am satisfied that they are using their best endeavours to mitigate the cause of complaint. I propose, therefore, to grant an injunction restraining the defendants from occasioning a nuisance by discharging crude sewage through the open channel and from discharging it or permitting it to flow from the culvert or sewer on to Eckford's land, but I will stay the operation of the injunction over the second motion day of Easter sittings, when it will be open to the defendants to apply for a further extension of time if it should be necessary.

Solicitors: *Charles Mylne Barker & Co.; Kekewich, Smith & Kaye, for Montague S. Blaker, Town Clerk, Lewes.*

G. R. A.

NEVILLE J.
1911
Oct. 13.

In re LORD NUNBURNHOLME.
WILSON *v.* NUNBURNHOLME.

[1910 N. 1468.]

Will—Construction—Legacy— Gift of Capital and Accumulations of Income at Twenty-six—Gift whether vested or contingent.

A testator bequeathed certain shares in a company upon trust out of the income thereof to pay his son an annual sum of 3000*l.* until he should attain the age of twenty-six and, when and so soon as he should attain that age, to hold the shares and the accumulations of income arising therefrom upon trust for his son absolutely. There was no gift over. The son survived the testator and died at the age of twenty-three:—

Held, that as the gift taken as a whole was intended solely for the benefit of the son, he took an absolute vested interest on the death of his father.

Dictum of Wood V.-C. in *Pearson* v. *Dolman* (1866) L. R. 3 Eq. 315, 321, approved.

Vawdry v. *Geddes* (1830) 1 Russ. & My. 203, distinguished.

ORIGINATING SUMMONS.

Lord Nunburnholme by his will dated September 8, 1906, after appointing executors and trustees of his will and after making certain specific bequests and devises, bequeathed (clause 13) all his shares in Thomas Wilson, Sons & Co., Limited, to his trustees upon trust to receive the income thereof and thereout to make certain annual and other payments, and subject thereto to divide his said shares into four equal parts, and the testator declared that his trustees should hold such four equal parts of the said shares—

(*a*) As to one such equal fourth part upon trust for his wife for life and after her death to hold one moiety of such part for his eldest son Charles absolutely, and as to the other moiety of such part upon trust as to one half part thereof upon the trusts thereinafter declared concerning the fourth part of the said shares bequeathed to his son Guy, and as to the other half part thereof upon the trusts thereinafter declared concerning the fourth part of the said shares thereinafter bequeathed for the benefit of his son Gerald Valerian Wilson;

(*b*) As to another equal fourth part of the said shares upon trusts for the benefit of his eldest son Charles and his children as therein mentioned;

(*c*) As to another equal fourth part of the said shares upon trust for his son Guy absolutely;

(*d*) "And as to the remaining one equal fourth part of my said shares upon trust out of the income and profits arising therefrom (but subject as aforesaid) to pay to my said son Gerald Valerian Wilson an annual sum not exceeding three thousand pounds (if the said income and profits shall amount to so much) until he shall attain the age of twenty-six years and when and so soon as he shall have attained the said age of twenty-six years my trustees shall hold such last mentioned one fourth part of my said shares and the accumulations of income arising therefrom, but subject as aforesaid, upon trust for my said son Gerald Valerian Wilson absolutely.

"And I direct my trustees so long as they may by law accumulate to invest in their names in or upon some or one of the modes of investment hereinafter authorised the residue for the time being of the annual income and profits last aforesaid and the resulting income thereof so as to accumulate at compound interest."

And the testator devised and bequeathed the residue of his real and personal estate to his said trustees upon trust for sale and conversion and to invest the net residue of the proceeds of sale, and to stand possessed of such net residue and the income thereof upon trust for his wife for life and after her death upon trust for such of his children as his wife should by deed or will appoint, and in default of such appointment upon trusts for his children and grandchildren as therein mentioned.

The testator died in October, 1907.

Gerald Valerian Wilson died in September, 1908, aged twenty-three, a bachelor and intestate, and the testator's widow was his legal personal representative. On the death of Gerald Valerian Wilson the question arose whether he took an absolute vested interest on the death of the testator in the one fourth of the shares bequeathed in trust for his benefit in clause (*d*) and in the one half of the moiety of the fourth part of the shares

NEVILLE J. 1911 — NUNBURNHOLME (LORD), *In re.* WILSON *v.* NUNBURNHOLME.

bequeathed in trust for his benefit in clause (*a*), or whether he took only a contingent interest therein so that on his death the same fell into the testator's residuary estate. The trustees took out a summons for the determination of this and other questions.

W. Copping, for the plaintiff trustees.

Peterson, *K.C.*, and *Pepys*, for the testator's eldest son and his children. It is submitted that the son Gerald took an absolute vested interest. The authorities shew that a gift which prima facie is contingent on a legatee attaining a certain age becomes vested if the whole of the income is in the meantime given for his benefit: *Love* v. *L'Estrange* (1); *Saunders* v. *Vautier* (2); *Greet* v. *Greet* (3); *Lister* v. *Bradley* (4); *Pearson* v. *Dolman* (5); *Hanson* v. *Graham* (6); *Locke* v. *Lamb.* (7) Here the gift is of a severed part of certain shares upon trust for the benefit of the son Gerald, there is no gift over, and he is the only object of the gift. It is a material point that the whole of the accumulations of income with the capital are to go to him at twenty-six. It is only the enjoyment of the whole that is postponed. Taking the gift as a whole, he is the sole object.

Dighton Pollock, for a married daughter of the testator and her children, supported this contention.

Jenkins, *K.C.*, and *C. A. Bennett*, for the testator's widow. It is not disputed that, as a rule, though the corpus of a fund is given in words which import a contingency, the legacy is vested if the whole of the income is given in the meantime for the benefit of the legatee: *Hanson* v. *Graham* (6); *Watson* v. *Hayes* (8); *Fox* v. *Fox* (9); *In re Williams.* (10) The fact that a severed fourth part of the shares is bequeathed upon trusts is immaterial. The difficulty here is that there is no direction to apply the whole of the income in the meantime for the benefit of the legatee. It is purely a question of intention on the construction of this particular will. Here the words "when and so soon as" import a contingency and not a mere postponement of the time

(1) (1727) 5 Bro. P. C. 59.
(2) (1841) Cr. & Ph. 240, 247.
(3) (1842) 5 Beav. 123, 128.
(4) (1841) 1 Hare, 10.
(5) L. R. 3 Eq. 315, 321.
(6) (1801) 6 Ves. 239.
(7) (1867) L. R. 4 Eq. 372.
(8) (1839) 5 My. & Cr. 125, 133.
(9) (1875) L. R. 19 Eq. 286, 290.
(10) [1907] 1 Ch. 180.

of enjoyment, there is a gift of only a part of the income in the meantime for the benefit of the son, and there is no declaration of trust of the corpus of the legacy and of the accumulations of income until the son attains twenty-six. There is no decision that in such a case the legatee takes an immediate vested interest. To support Mr. Peterson's contention it is essential to find that the whole of the income is given in the meantime to the son, but here the residue of the income is to be accumulated and the son does not get the accumulations or the corpus unless and until he attains twenty-six.

T. T. Method, for the infant children of another married daughter of the testator, adopted the same line of argument, and cited Theobald on Wills, 7th ed. p. 587, and *Vawdry* v. *Geddes*. (1)

Ashworth James and *Horace Woodhouse*, for other children and grandchildren of the testator.

NEVILLE J. The gift I have to construe here is in the following words :—" As to the remaining one equal fourth part of my said shares upon trust out of the income and profits arising therefrom (but subject as aforesaid) to pay to my said son Gerald Valerian Wilson an annual sum not exceeding three thousand pounds (if the said income and profits shall amount to so much) until he shall attain the age of twenty-six years and when and so soon as he shall have attained the said age of twenty-six years my trustees shall hold such last mentioned one fourth part of my said shares and the accumulations of income arising therefrom, but subject as aforesaid, upon trust for my said son Gerald Valerian Wilson absolutely." There, so far as Gerald is concerned, the only gift is when and so soon as he shall attain the age of twenty-six years, and I think the words employed primarily indicate contingency, and that if they stood alone Gerald would upon his death under twenty-six take no benefit. But what I have to consider here is whether, taking the gift as a whole, and if necessary taking the will as a whole, I can find an indication that the gift was intended to be vested in Gerald from the death of the testator, and that the reference to the

(1) 1 Russ. & My. 203.

NEVILLE J. 1911 NUNBURNHOLME (LORD), *In re.* WILSON *v.* NUNBURNHOLME.

age of twenty-six is simply an indication of the manner and the time at which the testator intends that he shall enjoy the benefit conferred upon him, and not a limitation of the gift itself. Now the first thing that I notice in clause 13, which deals with the property one fourth of which is disposed of in the way I have referred to, is that it is a specific bequest of certain shares in Thomas Wilson, Sons & Co., and those shares are given to trustees on certain trusts. That those trustees are the general trustees of the will is, I think, not material. The property vested in the trustees is to be held by them in four equal parts. With regard to the first part I need say nothing except that in certain contingencies one sixteenth of the whole, that is one fourth of a fourth share, is to go "upon the trusts hereinafter declared concerning the fourth part of my said shares hereinafter bequeathed to my son Guy Greville Wilson and as to the other half part thereof upon the trusts hereinafter declared concerning the fourth part of my said shares hereinafter bequeathed for the benefit of my said son Gerald Valerian Wilson." I do not think that much reliance can be placed on the gift over contained in sub-clause (*b*) of clause 13—"But if no son of my said eldest son shall attain the age of twenty-one years my trustees shall hold the said one fourth part of my said shares in trust for my said sons Guy Greville Wilson and Gerald Valerian Wilson in equal shares as tenants in common." There the gift is to Gerald absolutely, but it may well be that the testator intended him to have an absolute interest in this particular gift without intending him to have an absolute vested interest in the one fourth given him afterwards, and I do not rely on these words in coming to the construction of the will I am going to state. I observe, however, that in the gift to Gerald in sub-clause (*d*) the gift of the accumulations is followed by a direction to the trustees to accumulate "in or upon some or one of the modes of investment hereinafter authorised the residue for the time being of the annual income and profits last aforesaid and the resulting income thereof so as to accumulate at compound interest"—those accumulations having been given by the preceding words to Gerald.

Now several cases have been cited in which gifts of this

nature have been considered by the Courts, and in certain cases undoubtedly there were incidents which enabled the Court to conclude that the testator's intention was in favour of vesting when he had used words which, taken by themselves, imported a contingency. No doubt, in considering the question, the whole nature of the gift has been taken into account, and the severance of the property given, or the money given, and the vesting of it in trustees for the benefit of the legatee or beneficiary is a point to which weight has been attached. In this case I think there is a severance. It seems to me there is no substantial distinction between a specific bequest to a trustee on trust as to one fourth for one person and as to the other three fourths for other three persons and a gift of one fourth of the property to trustees on trust for one of them. In either case there is a severance for the benefit of the cestui que trust. So far as that goes, I think it is in favour of there being an intention on the part of the testator that notwithstanding the provision as to twenty-six years of age the gift to Gerald should be a vested gift. Then comes a point of more general importance, and it is this. It has been held that the gift of a legacy to a legatee on attaining a certain age accompanied by a gift of the whole of the income in the meantime vests the legacy, notwithstanding the contingency imported by the terms of the gift. But it has also been held that that does not apply where only part of the income is given; and one has to consider the meaning of that rule, for it must have had a meaning; there must have been some course of reasoning which enabled the Courts to adopt that construction of wills, because it is a general rule with which I have to deal. Of course it might be said that the gift of the income in the meantime is one thing and the gift of the capital is another and the fact that the testator intended the child to be provided for by the interest of the legacy ultimately given until the age referred to had been attained does not necessarily indicate an intention that if he did not attain that age his representatives should have the capital. But the Courts have thought otherwise. Now on what ground has that rule been founded? I think it is founded on this, that there has been an indication on the part of the testator to give the whole benefit of

NEVILLE J. 1911 — NUNBURNHOLME (LORD), *In re.* WILSON *v.* NUNBURNHOLME.

the legacy to the legatee, notwithstanding the provision which prima facie indicates that the capital is only to be vested at a particular age. In other words, if everybody else is excluded, so that everything will come sooner or later to the legatee, it is intended by the testator that he should have it, and the reference to the age must then be taken as an indication of the time of enjoyment and not as a diminution of the amount of the gift. Now there are circumstances in this case which do not seem to have been actually the subject of judicial decision. We have here a case where the gift is prima facie at twenty-six; where the whole or part of the income, according to the amount produced by the shares, is given to the legatee in the meantime; and we have a direction to accumulate and a gift of the accumulations to the legatee along with the capital. Therefore the whole thing is disposed of in favour of the legatee. The gift is wholly bestowed on him and nobody else. Of course if you have a gift to a legatee when he shall attain the age of twenty-six, and no more; or a gift to a legatee when he attains twenty-six and a gift to some one else of the income in the meantime; it is clear that it is a contingent gift. Or suppose the will is silent with regard to interest until the date for the transfer of the capital arrives, it seems to me you would have precisely the same thing. There in effect somebody else would be interested in the interest besides the legatee; it would go by way of intestacy or under a residuary gift to somebody else. The same rule applies where you have only a disposal of part of the income during the legatee's minority or before he attains the age indicated. It seems to me that exactly the same reasoning applies there; you cannot say the legacy is vested in the legatee because somebody else is interested. But when you have a gift of the legacy with the accumulations, provision being made for maintenance or enjoyment by that legatee in the meantime, is there then a vested gift, or is the prima facie import of the words to be adhered to and the legacy to be defeated in case of the death of the legatee under age? Under those circumstances it seems to me that, if the ground of the rule is as I have stated, upon principle it must be held that the legacy was a vested legacy.

But I do not think I am left entirely without authority,

although the exact point does not seem to have been specifically decided, and there are one or two cases to which I wish to refer shortly. The first is *Hanson* v. *Graham* (1), decided in 1801. There the principle as enunciated in prior cases is referred to and explained in this way: "It was not a simple, unqualified gift; but there were many circumstances to shew that Walter Nash" (the legatee) "was meant to have the benefit absolutely; and that the enjoyment only was postponed; the testator giving it to trustees in the meantime; and applying a reason for withholding the enjoyment from this minor; that he wished him to follow his trade as a journeyman; with which object he naturally thought that fortune would interfere; and therefore he postpones the enjoyment of it until the age of twenty-four"—that does not apply here—"But he gives it to trustees entirely and absolutely for the benefit of Walter Nash; to improve it for his benefit; to transfer the whole to him, when he arrives at that age; and to make him a certain allowance in the meantime"—that is precisely the form of the resulting gift in the present case. The judgment proceeds: "That is very different from a simple bequest to him, when twenty-four; for if that had been a legacy, it would have been separated from the residue immediately upon the testator's death; and must have been paid over to the trustees immediately: and they would have managed it, until the legatee had attained the age of twenty-four." I think that bears out what I have said, that the question is, whether it is given to the trustees entirely on behalf of and for the benefit of the legatee. The next case is *Pearson* v. *Dolman* (2), where Wood V.-C., says: "In this way I think some, though perhaps not all, of the cases may be reconciled where the income has been only partially given, that is to say, where a certain amount has been given to trustees for the purpose of maintenance, and not the whole income of the fund. In all cases, I apprehend, where ultimately, as in *Saunders* v. *Vautier* (3), the accumulated residue, whatever it may be, is to go to the same legatee, then the whole gift is vested." That is not the case he had to decide, but it seems to me to be a dictum in favour of the view I take

(1) 6 Ves. 239, 248.
(2) L. R. 3 Eq. 315, 321.
(3) Cr. & Ph. 240.

NEVILLE J. 1911 NUNBURNHOLME (LORD), *In re.* WILSON *v.* NUNBURNHOLME.

that where income is given, the accumulations being given also, the legacy is vested. The next case is *Watson* v. *Hayes* (1), where there is a passage which I think indicates the ground on which the rule is based: "It is, therefore, the giving the interest which is held to effect the vesting of the legacy, and not the giving maintenance; but when maintenance is given, questions arise, whether it be a distinct gift, or merely a direction as to the application of the interest; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy." That, I think, is tolerably obvious in that particular case. I should have thought that nowadays it is pretty clear that in that case the 500*l.* was given on the attainment of a particular age by the legatee, and that the 25*l.* was given in the meantime for maintenance; I should say they were distinct gifts, one for maintenance and the other at a particular age, and consequently there was nothing which could prevent the words of contingency having their natural import. Then there is the case of *Greet* v. *Greet* (2), which seems to me a strong case. There the question was as to a perpetuity. There was a gift of 5000*l.* to a nephew for life, and at his death to his eldest son at the age of thirty, but the accumulations were given to the son in the meantime, and the following passage occurs: "At the death of the nephew the 5000*l.* is to be taken out of the residue, and deposited for accumulation in the hands of trustees, one of whom was to be the eldest son of the nephew. The accumulation is directed to be for the use of the nephew's eldest son, 'at his attaining the age of thirty years.'" So that there is no gift of the accumulations until the arrival of the time fixed by the will. But the judge proceeds: "I think it comes to no more than this:—The testator intended that the son should attain the age of thirty years before the accumulated fund should be paid to him, and not that in the meantime he was to have no interest in this sum." With regard to the case of *Vawdry* v. *Geddes* (3), cited by Mr. Methold, it appears to me that is a case of a familiar kind. There the gift was to a class on their respectively attaining a particular age,

(1) 5 My. & Cr. 125, 133. (2) 5 Beav. 123, 128.
(3) 1 Russ. & My. 203.

the income to be applied for their maintenance and benefit in the meantime. I think it has been decided by other cases before *Vawdry* v. *Geddes* (1) that that does not enable the Court to hold that the legacy vests where words prima facie denoting contingency are used, and it seems to me for a somewhat obvious reason. In spite of what appears at first sight to have been said —whether it was intended I do not know—in *Fox* v. *Fox* (2), it seems to me that a gift to a class and a gift to individuals is open to an obvious distinction, inasmuch as all the class are interested in the fund where it is to be divided amongst them if they attain a particular age. There you have a very different thing from a gift of a share to each of the children on their attaining that particular age and a gift for maintenance in the meantime. I think, therefore, that *Vawdry* v. *Geddes* (1) does not really throw any light on the present case, but was simply an illustration of that general rule.

I come, therefore, to the conclusion that the gift is a severed gift; and, moreover, that the fact that the whole of the income is sooner or later given to the legatee overrides the contingency imposed by the word "when," and that the testator intended it, as he said, for the benefit of his son Gerald. I think, therefore, that the son Gerald took a vested interest.

Solicitors: *Woodhouse & Davidson; Collyer-Bristow & Co.; R. S. Taylor, Son & Humbert.*

(1) 1 Russ. & My. 203. (2) L. R. 19 Eq. 286.

H. L. F.

PARKER J.
1911
Feb. 15, 16.

WEYMOUTH WATERWORKS COMPANY *v.* COODE AND HASELL.

[1911 W. 99.]

Water—Waterworks Company—Dividends—Several Classes of Shareholders—Special Act—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 75—*Weymouth Waterworks Act,* 1897 (60 & 61 *Vict. c. ccvi.*), *s.* 27.

The provisions of the Waterworks Clauses Act, 1847 (ss. 75 et seq.), which relate to the payments of a waterworks company's dividends refer to the maximum amount which the company can lawfully distribute by way of dividend, and do not refer to the rights of the shareholders in the company inter se.

The Weymouth Waterworks Company was incorporated by an Act of 1797, but was subjected to the provisions of an Act passed in 1855, which incorporated the Waterworks Clauses Act, 1847, and authorized a capital of 40,000*l.* to be issued, but did not fix any maximum rate of dividend on the capital. In 1907 the company was empowered to raise further capital to the amount of 60,000*l.* by an Act which contained provisions that, except as by the Act otherwise provided, the new capital or the holders thereof were to be subject and entitled to the same liabilities, rights, and privileges as if it were part of the original capital, but limiting the dividend on the further capital to 5 per cent. per annum, unless a larger dividend should be necessary at any time to make up deficiencies of former dividends. These deficiencies existed in respect of both classes of capital, and there was an anticipated annual surplus which was available towards making up the deficiencies:—

Held that, in making up the deficiencies, the company was bound to preserve, between the total amounts paid by way of back dividends to the holders of the two classes of capital, the proportions of 10 per cent. and 5 per cent. prescribed by s. 75 of the Waterworks Clauses Act, 1847, and the special Act of 1897, as the maximum dividends on the two classes of shares respectively until the arrears were paid.

Special Case stated by consent under Order xxxiv., r. 8.

By the Act 37 Geo. 3, c. cxxix. (hereinafter referred to as "the Act of 1797"), intituled "An Act for supplying the borough and town of Weymouth and Melcombe Regis, and the parts adjacent, in the county of Dorset, with water," the plaintiff company was incorporated under the title of "The Company of Proprietors of the Weymouth Waterworks" for the purpose of supplying water within the limits of the Act of 1797.

By s. 1 of the Weymouth Waterworks Act, 1855 (18 & 19 Vict. c. cxxxiii.) (hereinafter referred to as "the Act of 1855"), the Act of 1797 was repealed, but subject to the provisions contained in the Act of 1855.

By s. 3 of the Act of 1855 the Companies Clauses Consolidation Act, 1845 (1), and the Waterworks Clauses Act, 1847 (2),

(1) Companies Clauses Consolidation Act, 1845, s. 120: "Previously to every ordinary meeting at which a dividend is intended to be declared the directors shall cause a scheme to be prepared, showing the profits, if any, of the company for the period current since the preceding ordinary meeting at which a dividend was declared, and apportioning the same, or so much thereof as they may consider applicable to the purposes of dividend, among the shareholders, according to the shares held by them respectively, the amount paid thereon, and the periods during which the same may have been paid, and shall exhibit such scheme at such ordinary meeting, and at such meeting a dividend may be declared according to such scheme."

Sect. 122: "Before apportioning the profits to be divided among the shareholders the directors may, if they think fit, set aside thereout such sum as they may think proper to meet contingencies, or for enlarging, repairing, or improving the works connected with the undertaking, or any part thereof, and may divide the balance only among the shareholders."

(2) Waterworks Clauses Act, 1847, s. 2: "The expression 'the special Act' . . . . shall be construed to mean any Act which shall be hereafter passed authorizing the construction of waterworks, and with which this Act shall be incorporated; and the word 'prescribed' used in this Act, in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word occurs shall be construed as if, instead of the word 'prescribed,' the expression 'prescribed for that purpose in the special Act' had been used . . . . and the expression 'the undertaking' shall mean the waterworks, and the works connected therewith, by the special Act authorized to be constructed; and the expression 'the undertakers' shall mean the persons by the special Act authorized to construct the waterworks."

Sect. 75: "The profits of the undertaking to be divided among the undertakers in any year shall not exceed the prescribed rate, or where no rate is prescribed they shall not exceed the rate of ten pounds in the hundred, by the year on the paid-up capital in the undertaking, which in such case shall be deemed the prescribed rate, unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate."

Sect. 76: "If the clear profits of the undertaking in any year amount to a larger sum than is sufficient, after making up the deficiency in the dividends of any previous year as aforesaid to make a dividend at the prescribed rate, the excess beyond the sum necessary for such

PARKER J. 1911 WEYMOUTH WATER-WORKS COMPANY v. COODE AND HASELL.

were incorporated with the Act of 1855, and by s. 4 of the Act of 1855 it was enacted that in construing the incorporated Acts as incorporated with the Act of 1855 the expression "the special Act" should mean the Act of 1855, and "the works" or "the undertaking" should mean the existing waterworks of the company and works connected therewith, as well as the works which the company was by the Act of 1855 and the Acts incorporated therewith authorized to execute, and the expressions "the promoters of the undertaking" or "the undertakers" should mean the company.

Sect. 6 of the Act of 1855 enacted that, notwithstanding the repeal of the Act of 1797, the company should continue a company for the purpose of supplying water within the limits of the Act of 1855 by the name of "The Company of Proprietors of the Weymouth Waterworks," and by that name should continue to be and should be a body corporate.

By s. 19 it was enacted that the capital of the company should be 40,000*l.* to be divided into 2000 shares of 20*l.* each.

By s. 20, 350 shares in the capital were to be allotted to the several persons who immediately before the passing of the Act of 1855 were proprietors in the company, and every share so allotted was to be deemed to be fully paid up.

The Act of 1855 did not prescribe any rate of dividend

purpose shall from time to time be invested in Government or other securities, and the dividends and interest arising from such securities shall also be invested in the same or like securities, in order that the same may accumulate at compound interest until the fund so formed amounts to the prescribed sum, or, if no sum be prescribed, to a sum equal to one tenth part of the nominal capital of the undertakers, which sum shall form a reserved fund to answer any deficiency which may at any time happen in the amount of divisible profits, or to meet any extraordinary claim or demand which may at any time arise against the undertakers; and if such fund be at any time reduced it may thereafter be again restored to the said sum, and so from time to time as often as such reduction shall happen."

Sect. 79: "If in any year the profits of the undertaking divisible amongst the undertakers shall not amount to the prescribed rate, such a sum may be taken from the reserved fund as, with the actual divisible profits of such year, will enable the undertakers to make a dividend of the amount aforesaid, and so from time to time as often as the occasion shall require."

limiting the profits of the undertaking to be divided among the undertakers in any year.

By s. 2 of the Weymouth Waterworks Act, 1897 (60 & 61 Vict. c. ccvi.) (hereinafter referred to as "the Act of 1897"), the Waterworks Clauses Act, 1847, and the provisions of the Companies Clauses Consolidation Act, 1845, with respect to (amongst other matters) the making of dividends were incorporated with the Act of 1897.

By s. 4 of the Act of 1897 the limits within which the company might supply water were extended.

By s. 24 of the Act of 1897 it was enacted that the company might raise, in addition to the capital authorized by the Act of 1855, any capital not exceeding 60,000*l.* by the creation and issue of new ordinary or preference shares or stock, but that the company should not issue any share of less nominal value than 20*l.*, nor any greater nominal amount of capital than should produce, including any premium obtained on the sale thereof, the sum of 60,000*l.*

Sect. 25 provided that, except as in that Act was otherwise provided, the capital in new shares or stock created by the company under the Act of 1897, and the new shares or stock therein and the holders thereof respectively, should be subject and entitled to the same powers, provisions, liabilities, rights, privileges, and incidents whatsoever in all respects as if that capital were part of the then existing capital of the company of the same class or description, and the new shares or stock were shares or stock in that capital, and that the capital in new shares or stock so created should form part of the capital of the company.

By s. 27 it was enacted that the company should not in any one year make out of their profits any larger dividend on the additional capital to be raised under the powers of that Act than 5*l.* in respect of every 100*l.* actually paid up of such capital, whether issued as ordinary or preference capital, unless a larger dividend should be at any time necessary to make up the deficiency of any previous dividend which should have fallen short of 5*l.* per cent. per annum.

Sect. 28 provided that, in case in any half-year the net

PARKER J. 1911 WEYMOUTH WATER-WORKS COMPANY v. COODE AND HASELL.

revenues of the company applicable to dividend should be insufficient to pay the full amount of the prescribed maximum rate of dividend on each class of ordinary shares or stock in the capital of the company, a proportionate reduction should be made in the dividend of each class.

Sect. 29 directed that the new shares or stock thereby authorized to be created and issued should be offered by auction or tender; and by s. 33 any premium arising from their issue was not to be considered as part of the capital entitled to dividend.

The whole of the capital of 40,000*l.* in shares of 20*l.* each (hereinafter referred to as old shares) authorized by the Act of 1855 had been long since issued and fully paid up; the issues of such capital, which had been very numerous, had been made from time to time as required between the years 1855 and 1882, both inclusive.

Of the additional capital of 60,000*l.* authorized by the Act of 1897, 39,000*l.* had been issued in 1950 ordinary shares of 20*l.* each (hereinafter referred to as new shares), and an aggregate sum of 5465*l.* had arisen by way of premiums from the issue of such shares. The issues (which had been five in number) of such shares had been made from time to time as required between the years 1897 and 1903, both inclusive. All such shares had been fully paid up.

No ordinary stock and no preference capital had been issued. Down to September 30, 1855, no dividend was paid by the company, but since that date down to the half-year ending June 30, 1910, dividends had always been paid, at rates varying from time to time. Since the end of the year 1907 and down to the half-year ending June 30, 1910, dividends had been paid on the old shares at the rate of 10*l.* per cent., which, in the absence of any special maximum rate being prescribed by the Act of 1855 for the share capital authorized thereby, was the "prescribed rate" therefor; and on the new shares at the rate of 5*l.* per cent., which was the "prescribed rate" under the Act of 1897.

A reserve fund, represented by investments authorized by the Trustee Act, 1893, of the aggregate nominal value of 6490*l.* 3*s.* 6*d.*

had been created by the company under s. 122 of the Companies Clauses Consolidation Act, 1845.

The aggregate of the deficiencies of dividends on the old shares previous to the year 1908 which had fallen short of the yearly rate of 10*l.* per cent. amounted to upwards of 50,000*l.*; and the aggregate of the deficiencies of dividends on the new shares previous to the year 1908 which had fallen short of the yearly rate of 5*l.* per cent. amounted to upwards of 2000*l.*

The company was in a prosperous condition, and its profits were, and as far as could be foreseen would continue to be, sufficient to provide, after payment of a dividend at the prescribed rate of 10*l.* per cent. on the whole of the old shares and a dividend at the prescribed rate of 5*l.* per cent. on the whole of the new shares, a substantial surplus available for the payment of further dividends towards making up the deficiencies of previous dividends on the old shares and new shares respectively which had fallen short of the respective prescribed rates.

The company was desirous of applying the surplus in payment of further dividends in respect of or so as to make up the deficiencies of previous dividends, and it was advised that it could lawfully apply the same, but that it was doubtful how the further dividends ought properly to be distributed as between the holders of shares in the respective capitals authorized by the Act of 1855 and the Act of 1897 respectively and as between the several members of the two classes of shareholders and the company; and the defendants John Charles Coode and Martin Hasell respectively, being desirous of obtaining the opinion of the Court in relation to the matter, had concurred in stating this case for that purpose.

The defendant Coode was the registered holder of sixteen old shares, and the defendant Hasell was the registered holder of ten new shares in the capital of the company.

The questions submitted for the opinion of the Court were: Whether upon the true construction of the Act of 1855, the Act of 1897, and the Acts incorporated with such Acts respectively, and in the events which had happened, profits of the company which the directors might consider applicable and which might

PARKER J. 1911 WEYMOUTH WATER-WORKS COMPANY v. COODE AND HASELL.

be properly applicable in any year to the purpose of paying a dividend in respect of or so as to make up any deficiency of any previous dividend upon any of the old shares or any of the new shares or any further shares (hereinafter referred to as "further new shares") forming part of the additional capital authorized by the 1897 Act which might for the time being have been issued which should have fallen short of the respective prescribed rates ought properly to be distributed amongst all the registered holders for the time being of the old shares, the new shares, and the further new shares in proportion to the aggregate nominal amount of the shares held by each of them respectively, but as between the holders of old shares on the one hand and of new shares and further new shares on the other hand so that for every 10*l.* which should be distributed amongst the registered holders of old shares 5*l.* should be distributed amongst the registered holders of new shares and further new shares, and so in proportion for any less amount, or in proportion to the aggregate nominal amount of the shares held by each of them respectively without any distinction being made between the several classes of shareholders in regard to the rate of distribution, or among all the registered holders of any shares in respect of which a deficiency of previous dividend still remained to be made up, and, if so, whether with or without a distinction between the several classes in regard to the rate of distribution, or in such proportions as would provide for the holder of each share participating in proportion to the aggregate amount of deficiency remaining to be made up in respect of it; or whether each year in which there had been a deficiency of dividend ought to be considered separately, and, if so, whether deficiencies of dividend which had occurred in earlier years ought first to be made up in full, or whether the profits ought to be applied in making up deficiencies that had occurred in such years as the company should determine; and in either case whether such profits ought to be distributed among all the holders of shares in respect of which there was a deficiency in the year in question in such proportions as would provide for the holder of each share participating in proportion to the amount of deficiency remaining to be made up in respect of it.

Romer, K.C., and *Pember*, for the company.

P. F. S. Stokes, for the defendant Coode (who represented the holders of the shares in the original capital). The course which the company is to adopt is shewn by s. 27 of the Act of 1897, which limits to 5 per cent. the dividend to be paid on the new capital except for the purpose of making up deficiencies in previous dividends at the rates respectively prescribed for those dividends. If there is any excess beyond what is applicable for that purpose, it must, under s. 76 of the Waterworks Clauses Act, 1847, be carried to reserve, and the holders of the new capital have no right to share equally with the holders of the original capital.

T. J. C. Tomlin, for the defendant Hasell (who represented the holders of the shares in the new capital). The provisions of the Companies Clauses Consolidation Act, 1845, the Waterworks Clauses Act, 1847, and the special Acts of the plaintiff company must be considered in order to ascertain the rights of different classes of shareholders inter se; but the provisions of the Act of 1847 as to the payment of dividends were inserted for the protection of the public by limiting the power of a water company in distributing dividends to a certain part of the profits made. Those provisions do not deal with the rights of classes of shareholders inter se, but were substituted for provisions as to the limit on dividends, which were usually to be found in special Acts passed before 1847.

Dividends are payable for the current year, and the shares are all of one class and confer the same rights and privileges except as regards the rate of dividend. The Act does not contemplate the payment of back dividends, and "whatever sum is in any given year taken and permitted to be divided by way of dividend is divisible among the then shareholders of the company": per Cozens-Hardy L.J. in *Lamplough* v. *Kent Waterworks Co.* (1)

First, the total amount of profit distributable as dividend must be ascertained, and the different classes of shareholders must then be paid according to the prescribed rates; but when the company comes to make up deficiencies all the shareholders

(1) [1903] 1 Ch. 575, 585.

PARKER J. 1911 WEYMOUTH WATER-WORKS COMPANY v. COODE AND HASELL.

must share alike. [He referred to the Companies Clauses Consolidation Act, 1845, s. 120, and to the Weymouth Waterworks Act, 1897, ss. 25, 27, 28.]

PARKER J. In my opinion the argument of counsel representing the holders of new shares is correct so far as the Waterworks Clauses Act, 1847, is concerned. Sect. 75 and the following sections, forming part of the same fasciculus of clauses, appear to me to relate to the maximum sum which a company may divide in dividend, and to have nothing to do with the rights inter se of the shareholders; and that clause or set of clauses works perfectly satisfactorily as long as there is only one set of shareholders, but of course difficulties may arise and will arise as you increase the number of classes into which the share capital of the company is divided. In the present case the original share capital of the company is a share capital in respect of which the prescribed rate of dividend is 10 per cent. (that is to say, the maximum is 10 per cent.). Then came a later Act, which creates another class of shares, and I think that Act would have involved a very considerable difficulty but for a particular section to which I am about to refer. [His Lordship read s. 27 of the Act of 1897, and continued:] It appears to me that that section contemplates that the company will declare and make a separate dividend in respect of the new shares to the dividend which they make in respect of the old shares; and if that be so, it appears to me that all difficulty really vanishes. For what the company have to ask themselves in the case of a dividend which they propose to declare on the new shares is whether a larger dividend than 5 per cent. is justified by reason of its being required to make up the deficiency of any previous dividend which shall have fallen short of the 5 per cent. allowable in respect of those shares. Similarly when they declare a dividend in respect of the old shares what they have to ask themselves is (following the words of s. 75 of the Waterworks Clauses Act, 1847) whether a larger dividend than 10 per cent. is allowable by reason of its being necessary to make up the deficiency in any previous dividend which shall have fallen short of 10 per cent. Dealing with the two sets of shares separately it appears to me that what happens is this:

When the company, to use the current expression, are going to pay what is inaccurately described as back dividends, they must deal with those shares separately, and may go on declaring larger dividends in respect of each class until the arrears, as it were, in respect of that class have been satisfied; but as soon as the arrears in respect of either class are satisfied they have to stop with regard to that class. That being the case, the only other point is whether it is allowable for the company to pay back dividends in respect of one class of shares without at the same time providing a corresponding dividend in respect of another class of shares, both classes of shares being ex hypothesi in arrear. It appears to me that the proper way of doing that is to treat the extra dividend as a dividend which is payable for the year and to preserve the same proportions between the total dividends paid to the two classes of shareholders as exists by statute with respect to the maximum dividends—that is to say, if a dividend of 12 per cent. is paid to the 10 per cent. maximum class, then a dividend of 6 per cent. must be paid to the 5 per cent. maximum class; and that can be done until in the case of the new shares the whole of the arrears, as I may call them, have been wiped off—that is to say, till the time has arrived when no higher dividend than 5 per cent. is necessary by reason of any deficiency in any prior year. When that time arrives they cannot pay more than 5 per cent. to the shareholders of that particular class. At the same time they may go on in a similar way with respect to the 10 per cent. shareholders, paying them additional dividends until the time comes when it cannot be said that a larger dividend than 10 per cent. is necessary by reason of any deficiency in any prior year; then they stop. It appears to me that that is in accordance with the words of the Act, and also is just as between the parties.

Solicitors for all parties: *King, Wigg, Robertson & Brightman, for W. B. Barrett, Weymouth.*

F. E.

SWINFEN EADY J.

1911

Oct. 19.

In re LAWLEY.

JACKSON *v.* LEIGHTON.

[1911 L. 1219.]

Executor — Liability — Testator's Leaseholds — Assignment by Executor to a "Purchaser"—Meaning—Payment to Assignee—Covenant by Assignee to indemnify—Law of Property Amendment Act, 1859 (22 *& 23 Vict. c.* 35), *s.* 27—*Lord St. Leonards' Act.*

An assignment by an executor of his testator's leasehold property to an assignee who is paid money for taking over the lease and indemnifying the executor is not an assignment to a "purchaser" within s. 27 of the Law of Property Amendment Act, 1859.

The word "purchaser" in this section means a person who buys the lease and pays a price in money for it.

Dodson v. *Sammell* (1861) 1 Dr. & Sm. 575, 579; *Dean* v. *Allen* (1855) 20 Beav. 1, 4; and *Waller* v. *Barrett* (1857) 24 Beav. 413, 420, applied.

ORIGINATING SUMMONS.

By her will dated July 7, 1908, a testatrix appointed the plaintiff and defendant her executors, and devised and bequeathed her residuary real and personal estate to the defendant.

The testatrix died on November 21, 1910. Her estate included (inter alia) a leasehold house which was demised to her by a lease dated July 26, 1902, for twenty-two years less ten days from Lady Day, 1902, at the rent of 234*l.* and subject to repairing and other covenants.

After the testatrix's death the executors made efforts to find a purchaser or lessee of the house, through various estate and house agents, but these efforts were fruitless.

By an assignment dated May 22, 1911, and made between the executors of the one part and certain surveyors and co-partners in Sloane Street, thereinafter called the assignees, of the other part, the executors, in consideration of the covenants by the assignees thereinafter contained, assigned the premises comprised in the lease to the assignees subject to the payment of the rent and performance of the covenants, and the assignees covenanted to pay the rent and perform the covenants and to indemnify the

assignors and the estate of the testatrix against all claims and demands in respect thereof.

The executors in fact paid the assignees 500*l.* out of the assets as consideration for taking over the lease, though this was not mentioned in the assignment. The debts and legacies had been paid, and the executors were now ready to complete the administration of the estate.

This summons was issued to determine whether the executors ought to set aside any and what part of the residuary estate to answer the future liabilities under the covenants of the lease, or whether the above assignment constituted the assignees purchasers within s. 27 of the Law of Property Amendment Act, 1859 (Lord St. Leonards' Act), so that the executors' personal liability was gone and the plaintiff could release the residuary estate to the defendant without making any such provision.

J. G. Wood, for the plaintiff. Sect. 27 of the Law of Property Amendment Act, 1859, so far as material hereto provides that where an executor, liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator whose estate is being administered, "shall have assigned the lease or agreement for a lease to a purchaser thereof" he shall be at liberty to distribute the residuary personal estate without appropriating any part to meet any future liability under the said lease or agreement for a lease, and the executor so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, be personally liable in respect of any subsequent claim thereunder; but nothing therein contained shall prejudice the right of the lessor or those claiming under him to follow the assets.

This section only applies where there has been an assignment by an executor to a purchaser: *In re Nixon.* (1) An assignment to a residuary legatee on a covenant to indemnify is not within the section: *Dodson* v. *Sammell.* (2) It follows that a mere covenant to indemnify does not make an assignee a purchaser within the section, a fortiori where he is paid for taking the assignment.

(1) [1904] 1 Ch. 638, 644. (2) 1 Dr. & Sm. 575, 579.

SWINFEN EADY J.
1911
LAWLEY, *In re.* JACKSON *v.* LEIGHTON.

In cases before the Act the Court did not set aside an indemnity fund where the lease itself coupled with the assignee's indemnity formed a sufficient security, secus if the lease was valueless: *Dodson* v. *Sammell* (1); *Dean* v. *Allen* (2); *Waller* v. *Barrett*. (3) Having regard to this practice, s. 27 was clearly only intended to apply to a lease of sufficient value to find a purchaser in the strict sense.

Wright Taylor, for the defendant. The assignees were purchasers within s. 27. The covenant for indemnity was valuable consideration and they would clearly have been purchasers within 27 Eliz. c. 4—*Price* v. *Jenkins* (4)—or within the definition clause of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 2, clause viii. The assignees acquired the lease plus 500*l.* and the consideration they gave for the lease and the cash together was their covenant to indemnify. This was valuable consideration and they were purchasers within the section.

An assignment to a residuary legatee is on an entirely different footing from an assignment to a stranger. The residuary legatee takes under the will and is in no sense a purchaser, though of course he has to give the usual covenant for indemnity.

J. G. Wood in reply.

SWINFEN EADY J. The question is whether the assignees of the lease were purchasers within s. 27 of the Law of Property Amendment Act, 1859. The lease was an onerous lease at a heavy rent of 234*l.* a year and the executors were unable to dispose of it through the usual channels. With the consent of the residuary legatee, who was one of the two executors, they assigned the lease to assignees who in consideration of receiving a payment of 500*l.* were prepared to take it over and indemnify the executors. This payment does not appear on the face of the assignment, but it is not disputed that the 500*l.* was in fact paid to the assignees as consideration for their taking over the lease.

In my opinion the assignees were not purchasers within s. 27.

(1) 1 Dr. & Sm. 575, 579.
(2) 20 Beav. 1, 4.
(3) 24 Beav. 413, 420.
(4) (1877) 5 Ch. D. 619.

They were not really purchasers at all. They were paid 500*l.* to take the assignment and indemnify the assignors.

The object of s. 27 is to enable an executor to distribute the residuary estate without appropriating any part to meet any future liability under the lease. It is true that the lessor or those claiming under him can still follow the assets, but the executor, after having assigned the lease to a purchaser, is no longer personally liable.

The meaning of the word "purchaser" in this section can be gathered by reference to the decisions on the practice prior to the Act. Under that practice an indemnity fund was set aside where the property comprised in the lease did not of itself furnish a sufficient security; but where the lease was valuable, the ground rent being small compared with the rack rent, that circumstance coupled with the indemnity of the purchaser was considered sufficient protection because it would be more for the advantage of the lessor to eject than to bring an action on the covenant, and therefore it was not necessary to set anything aside for an indemnity. See *Dodson* v. *Sammell* (1); *Dean* v. *Allen* (2); *Waller* v. *Barrett.* (3)

In this case the lease was onerous and no purchaser was forthcoming. An assignment was only effected by paying 500*l.* to the assignees. This fact shews that there was no value in the lease. Now, although the word "purchaser" is used in many senses and might in some cases include an assignee who merely gives a covenant for indemnity, I am of opinion that as used in s. 27 it means a person to whom the lease is sold, and who pays a price in money for it. The plaintiff is therefore entitled to have a fund set aside by way of indemnity to answer any claim that may arise. The amount will be settled in chambers.

Solicitors: *Corbin, Greener & Cook.*

(1) 1 Dr. & Sm. 575, 579. (2) 20 Beav. 1, 4.
(3) 24 Beav. 413, 420.

G. R. A.

SWINFEN EADY J.
1911
Oct. 24.

In re PICCADILLY HOTEL, LIMITED.
PAUL *v.* PICCADILLY HOTEL, LIMITED.

[1908 P. 1724.]

Company—Debentures—Remuneration of Trustees—Quantum—Period—Lien.

B debenture stock issued by the above company was secured by a trust deed (called the B security) on the general assets and on the site of a hotel, with a "primary trust for conversion" when the B security became enforceable.

Clause 18 provided that the B trustees should hold the moneys to arise under the primary trust for conversion upon trust that they should thereout in the first place pay or retain their costs and expenses "including the remuneration of the B trustees" and should apply the residue in payment of the B stockholders, and should pay the surplus (if any) to the company.

Clause 34 provided that the company should pay the B trustees a fixed remuneration per annum to continue payable until the trusts of the B security should be finally wound up and whether or not a receiver should be appointed or the trusts should be administered by the Court.

The B security became enforceable and a receiver was appointed in a B stockholder's action. This receiver was superseded by a receiver appointed in an action by the trustees of a prior lien security, to which action the B trustees were parties, and in which their security was established.

The hotel was actually sold by the prior lien trustees, the entire purchase-money being received and paid by them into Court in pursuance of an order in the prior lien action. The B trustees joined in the conveyance.

After discharging the prior lien a considerable surplus was left in Court for the B stockholders:—

Held, that the B trustees were entitled to their fixed contractual remuneration under clause 34 until the trusts of the B security were finally wound up, and under clause 18 to a lien on the surplus proceeds of sale in Court in priority to the B stockholders.

Debenture Corporation, Ld. v. *Uttoxeter Brewery, Ld.*, noted in Palmer's Company Precedents, 10th ed. pt. iii. p. 737, followed on the latter point.

In re Accles, Ld. [1902] W. N. 164, distinguished.

MOTION.

On February 24, 1905, the above company (now in liquidation) created an issue of 700,000*l.* first mortgage debenture stock,

of which 600,000*l.* was actually issued. This stock (hereinafter called the B stock) was secured by a trust deed dated February 24, 1905, and made between the company of the one part and the City Safe Deposit and Agency Company, Limited (hereinafter called the B trustees), of the other part. In stating this deed (hereinafter called the B security) the distinctive letter B has been inserted where required.

Clause 1 defined certain terms used in the deed. "The specifically mortgaged premises" meant the premises to be comprised in a certain Crown lease therein referred to (being the site of the Piccadilly Hotel subsequently erected thereon). "The mortgaged premises" meant and included the specifically mortgaged premises and the general assets collectively.

Clauses 10, 11, and 12 contained provisions as to mortgaging the specifically mortgaged premises to the B trustees.

Clause 13. "The company hereby charges in favour of the B trustees its undertaking and all its other property and assets for the time being not forming part of the specifically mortgaged premises both present and future including its uncalled capital with the payment to the B trustees of all moneys for the time being owing on the security of these presents and such charge shall rank as a floating charge but so that the company shall not be at liberty to create and shall not create any mortgage or charge ranking or which may by any means be made to rank in priority to or pari passu with the moneys hereby secured."

Clause 14 provided that the B trustees should permit the company to hold the mortgaged premises and carry on therein and therewith the company's business until the B security became enforceable, and then the B trustees in their discretion might and upon the request in writing of the holders of one fourth of the B stock should enter upon or take possession of the mortgaged premises and sell, call in, collect, and convert into money or manage or deal with the same as they should think fit. This clause was thereinafter referred to as "the primary trust for conversion."

Clause 15 specified the events in which the B security became enforceable.

Clause 18. "The B trustees shall hold the moneys to arise

SWINFEN EADY J.
1911
PICCADILLY HOTEL, LIMITED, *In re.*
PAUL *v.* PICCADILLY HOTEL, LIMITED.

from any sale calling in collection or conversion under the primary trust for conversion upon trust that they shall thereout in the first place pay or retain the costs and expenses incurred in or about the execution of such trust or otherwise in relation to these presents including the remuneration of the B trustees and shall apply the residue of such moneys—(First) In or towards payment to the B stockholders pari passu in proportion to the amount due to them respectively and without any preference or priority whatsoever of all arrears of interest remaining unpaid on the stock held by them respectively; (Secondly) In or towards payment to the B stockholders pari passu in proportion to the stock held by them respectively and without any preference or priority on account of priority of issue or otherwise howsoever of all principal moneys and premiums (if any) due in respect of the stock held by them respectively, and that whether the same principal moneys shall or shall not then be payable; and (Thirdly) shall pay the surplus (if any) of such moneys to the company or its assigns.'"

Clause 21 provided that at any time before the security became enforceable the B trustees upon the application and at the expense of the company (but only if and so far as in their opinion the interests of the B stockholders should not be prejudiced thereby) might do or concur in doing certain things in respect of the specifically mortgaged premises. Among other things they might exercise all or any of the powers or rights incident to the ownership of all or any of the specifically mortgaged premises, and in particular as regards securities the right to enforce the same by foreclosure, sale, or otherwise, and might execute conveyances thereof.

Clause 22. "All net capital moneys arising under the last preceding clause and all assets acquired pursuant to that clause shall become part of the specifically mortgaged premises and shall be vested in the B trustees accordingly."

Clause 23 provided that subject as aforesaid the B trustees should invest the net capital moneys referred to in clause 22 and should stand possessed of the said investments upon trust until the primary trust for conversion should arise to pay the income thereof to the company, and after the primary trust for

conversion should have arisen should hold the investments and the income thereof "upon and for the trusts and purposes hereinbefore expressed concerning the moneys to arise from any sale calling in collection and conversion under the primary trust for conversion," provided always that in default of that trust for conversion arising and after payment and satisfaction of all moneys intended to be secured by these presents the investments and the income thereof should be held in trust for the company.

Clause 34. "The company shall in each and every year during the continuance of this security pay to the B trustees as and by way of remuneration for their services as trustees the sum of 262*l.* 10*s.* per annum. The said remuneration shall be paid as regards each year by two equal instalments payable respectively on January 1 and July 1 in each year and the first payment shall be made on July 1, 1905. The said remuneration shall continue payable until the trusts hereof shall be finally wound up and whether or not a receiver or receivers or receiver or manager shall have been appointed or the trusts of these presents shall be in course of administration by or under the direction of the Court."

Clause 37. "Without prejudice to the right to indemnity by law given to trustees, the B trustees and every receiver attorney manager, agent or other person appointed by the B trustees hereunder shall be entitled to be indemnified out of the mortgaged premises in respect of all liabilities and expenses properly incurred by them or him in the execution or purported execution of the trusts hereof or of any powers authorities or discretions vested in them or him pursuant to these presents and against all actions proceedings costs claims and demands in respect of any matter or thing done or omitted in anywise relating to the premises and the B trustees may retain and pay out of any moneys in their hands from the trusts of these presents all sums necessary to effect such indemnity."

Clause 47. "Upon proof being given to the reasonable satisfaction of the B trustees that the holders of all the B stock entitled to the benefit of the trusts herein contained and for the time being issued have been paid or satisfied and upon payment of all costs charges and expenses incurred by the

SWINFEN EADY J.

1911

PICCADILLY HOTEL, LIMITED, *In re.*

PAUL *v.* PICCADILLY HOTEL, LIMITED.

B trustees in relation to these presents the B trustees shall at the request of the company reconvey or reassign to the company the mortgaged premises or such part thereof as may remain vested in them freed and discharged from the trusts herein contained or otherwise release the mortgaged premises from this security."

In 1907 with the consent of the B stockholders the company created an issue of prior lien bonds to the extent of 500,000*l.* These were only taken up to the extent of 350,000*l.* They were secured by a trust deed dated September 18, 1907, and ranked in priority to the B stock. This trust deed (hereinafter called the A security) did not charge the uncalled capital.

In 1908, the B security having become enforceable, the plaintiff Paul, a B stockholder, commenced the present action (hereinafter called action B) to enforce the B security, and on August 10, 1908, a receiver and manager was appointed.

The prior lien trustees (hereinafter called the A trustees) subsequently commenced proceedings to enforce the A security, and on February 8, 1909, a receiver and manager was appointed in their action (hereinafter called action A) in substitution for the receiver and manager in action B, and the usual judgment, including an order for inquiries as to other incumbrances, amounts due, and priorities, was made. The B trustees and Paul were among the defendants in action A, and the B security was established in that action. Proceedings went on in action A and subsequently a conditional contract was approved by the Court for the sale of the hotel for 500,000*l.*, the A trustees being ordered to receive the purchase-money and to pay it into Court in action A.

The money was duly received and paid into Court by the A trustees, the B trustees joining in the conveyance. On May 5, 1911, the A security was discharged, and a substantial surplus of about 69,000*l.* was left for the B stockholders. This should strictly have been transferred to action B, but it was thought it would be less expensive to distribute it in action A. On June 20, 1911, the A trustees were dismissed as plaintiffs and Paul became the plaintiff in action A.

On July 5, 1911, an order was made by the registrar in

action B staying that action and providing for taxation and payment of costs of the plaintiff and the B trustees as between solicitor and client, including in the costs of the B trustees any costs, charges, and expenses properly incurred by them up to February 8, 1909 (when the receiver and manager in action A was appointed), and directing the balance of the funds in Court in action B to be transferred to action A. These funds consisted of 1968*l.* Consols and 11*l.* cash representing the original receiver's balance paid into Court on July 27, 1909, and 1307*l.* cash representing the realization of uncalled capital which had been received and paid in by the liquidator in the winding up of the company in pursuance of an order of May 3, 1911.

The registrar's order did not provide for the payment of the B trustees' remuneration since January 1, 1908, the date of the last payment, and it was not drawn up. On the matter being referred to the registrar he directed a pro forma summons to be issued raising the question of the B trustees' remuneration, and on July 28, 1911, after a full argument he made an order allowing the B trustees 158*l.* remuneration out of the funds in Court from January 1, 1908, to August 10, 1908, and declaring that they had no lien on the funds in Court for remuneration since August 10, 1908, the date of the appointment of the receiver in action B.

The B trustees and the plaintiff brought cross-motions to vary this order. The B trustees claimed to be paid 262*l.* 10*s.* remuneration per annum until the trusts of the B security were finally wound up and a lien on the funds in Court for that remuneration. They claimed that 918*l.* was due to them up to July 1, 1911. The plaintiff contended that the B trustees were not entitled to any lien at all in respect of their remuneration.

Younger, *K.C.*, and *Bischoff*, for the B trustees. Directors' remuneration may continue notwithstanding the appointment of a receiver and manager—*In re South Western of Venezuela (Barquisimeto) Ry. Co.* (1)—and the same principle must apply to trustees for debenture stockholders. It is merely a question of construction of the remuneration clause. In the present case clause 34 is absolutely clear. The remuneration is 262*l.* 10*s.*

(1) [1902] 1 Ch. 701.

SWINFEN EADY J.
1911
PICCADILLY HOTEL, LIMITED, *In re.*
PAUL *v.* PICCADILLY HOTEL, LIMITED.

per annum and it continues notwithstanding the appointment of a receiver and manager. In these circumstances the questions of quantum and period of remuneration discussed by Chitty J. in *Debenture Corporation, Ld.* v. *Uttoxeter Brewery, Ld.* (1) and *Debenture Corporation, Ld.* v. *C. de Murietta & Co., Ld.* (2), noted in Palmer's Company Precedents, 10th ed. pt. iii. pp. 737, 738, do not arise. The B trustees have a clear contractual right against the company for the full remuneration they claim.

Again clause 18 clearly gives them a lien for their remuneration on the moneys to arise from any sale, calling in, collection, or conversion under the primary trust for conversion: *Debenture Corporation, Ld.* v. *Uttoxeter Brewery, Ld.* (1) In *In re Accles, Ld.* (3) the remuneration was not charged on the proceeds of conversion and the trustees could only rely on certain words at the end of an indemnity clause like clause 37 enabling them to retain and pay their remuneration out of moneys in their hands, the indemnity alone being charged on the mortgaged premises. Now here, the B security having become enforceable, the primary trust for conversion clearly arose and the trusts of clause 18 became applicable. The hotel was sold by the A trustees, the B trustees joining in the conveyance, and by clause 23 the surplus proceeds of sale were impressed with the trusts of clause 18 by reference. The fact that the money was paid into Court in pursuance of an order made in the B trustees' presence makes no difference to their rights: *Richmond* v. *White* (4); *Debenture Corporation, Ld.* v. *Uttoxeter Brewery, Ld.* (1) Clause 18 is really a declaration of trust of those surplus proceeds for the B stockholders subject to the B trustees' costs, expenses, and remuneration. It is in fact the only clause under which the B stockholders have any claim. The same principle applies to the receiver's balance and the calls, both of which are subject to the trusts of the B security.

Gore-Browne, K.C., and *Attwater*, for the plaintiff. Clause 34 merely gives the B trustees a contractual right against the company: *In re Accles, Ld.* (3) Their only claim to a lien is under

(1) April 25, 1895. Unreported.
(2) Unreported.
(3) [1902] W. N. 164; 51 W. R. 57; 18 Times L. R. 786.
(4) (1879) 12 Ch. D. 361, 364.

clause 18. But this clause merely enables them to pay or retain their remuneration out of moneys arising under the primary trust for conversion. They can only pay or retain their remuneration out of moneys actually or constructively in their hands: *Pulman* v. *Meadows*. (1) They could not have received any moneys after a receiver was appointed: *In re Jones*. (2)

[SWINFEN EADY J. The purchase-money for the hotel was paid into Court in pursuance of an order made in the B trustees' presence. It was never contemplated that the receiver was to receive this money.]

In *Debenture Corporation, Ld.* v. *Uttoxeter Brewery, Ld.* (3) the trustees who claimed remuneration had the actual conduct of the sale. In the present case the hotel was sold by the A trustees, who could give a good discharge for the purchase-money.

[SWINFEN EADY J. The A trustees were not exercising their power of sale. The B trustees joined in the conveyance.]

The primary trust for conversion was never exercised and the trusts of clause 18 never arose. The B stockholders do not claim under clause 18. They claim under clause 47. That is a proviso for redemption which clearly gives them an implied lien. It also gives the B trustees an implied lien for their costs, charges, and expenses, but does not mention their remuneration.

Younger, K.C., in reply.

SWINFEN EADY J. (after stating the facts). There are three funds now available for distribution.

The first fund is the 1968*l.* Consols representing the original receiver and manager's balance. That is in Court in action B.

The second fund is the 1307*l.* cash representing the realization of uncalled capital. That is also in Court in action B. The uncalled capital was comprised in the B security but not in the A security. The calls were received and paid into Court by the liquidator and did not pass through the hands of the receiver.

The third and largest fund is the 69,000*l.* the balance of the 500,000*l.* proceeds of sale of the hotel remaining after discharging the A security. That is in Court in action A.

(1) [1901] 1 Ch. 233. (2) (1885) 31 Ch. D. 440, 444.
(3) April 25, 1895. Unreported.

SWINFEN EADY J.
1911
PICCADILLY HOTEL, LIMITED, *In re.*
PAUL *v.* PICCADILLY HOTEL, LIMITED.

The B trustees claim remuneration at the rate of 262*l.* 10*s.* a year from January 1, 1908, until the trusts of the B security are finally wound up. Their claim up to July 1, 1911, amounts to 918*l.* Now clause 34, which fixes the quantum and period of their remuneration, is wide and comprehensive. It cannot be disputed that they are to be paid at the rate of 262*l.* 10*s.* a year, and that their remuneration continues payable notwithstanding the appointment of a receiver until the trusts of their trust deed are finally wound up. In these circumstances the question of quantum and period dealt with by Chitty J. in *Debenture Corporation, Ld.* v. *Uttoxeter Brewery Ld.* (1), noted in Palmer's Company Precedents, 10th ed. pt. iii. p. 737, does not arise in the present case. The language of clause 34 is perfectly clear as to quantum and period. If any question had arisen the observations of Buckley J. in *In re South Western of Venezuela (Barquisimeto) Ry. Co.* (2) would have been of some assistance. Both parties, however, admit that clause 34 is quite plain, and I am of opinion that as against the company the B trustees are entitled to the full amount of remuneration they claim.

The real question, however, is whether they are entitled to their remuneration out of the funds in Court in priority to the B stockholders. Their trust deed differs from that in *In re Accles, Ld.* (3) Not only is there a provision that the B trustees are to retain their costs and expenses out of the moneys to arise under the primary trust for conversion, but they are also to retain their remuneration. Clause 18 provides that the B trustees shall hold the moneys to arise from any sale, calling in, collection, or conversion under the primary trust for conversion upon trust that they shall thereout in the first place pay or retain the costs and expenses incurred in or about the execution of that trust or otherwise in relation to these presents "including the remuneration of the B trustees."

Now the B security became enforceable and the primary trust for conversion arose. It is objected that the actual event contemplated by clause 18 has not arisen. It is contended that there has been no sale, calling in, collection, or conversion by the

(1) April 25, 1895. Unreported.
(2) [1902] 1 Ch. 701.
(3) [1902] W. N. 164; 51 W. R. 57; 18 Times L. R. 786.

B trustees under the primary trust for conversion. Though the hotel was ordered to be sold in action A, to which the B trustees were parties, and the purchase-money was paid into Court in pursuance of the order, and the B trustees joined in the conveyance, it is nevertheless urged that there was no execution of the primary trust for conversion, that the purchase-moneys never passed into the hands of the B trustees, and the trusts of clause 18 never arose.

In *Richmond* v. *White* (1) Cotton L.J. said, "The Court never allows an order for payment of money into Court to prejudice the rights of the person paying it in," and in *Debenture Corporation, Ld.* v. *Uttoxeter Brewery, Ld.* (2) Chitty J. quoted this statement with approval and said, "I think that may be enlarged so as to make it applicable to the present case by saying that the order for payment into Court is not allowed to prejudice the rights of a person existing at the time." Whether, therefore, the surplus proceeds of sale were actually paid to the B trustees, or into Court in pursuance of an order made in their presence, is immaterial. Their rights were not prejudiced.

Clause 18 is really a declaration of trust of those surplus proceeds however they arise. This is borne out by clause 23, which provides that after the primary trust for conversion shall have arisen the B trustees shall hold the investments of net capital moneys forming part of the specifically mortgaged premises "upon and for the trusts and purposes hereinbefore expressed concerning the moneys to arise from any sale calling in collection and conversion under the primary trust for conversion." It is not of the essence of clause 18 that the B trustees should actually receive the moneys, so long as they really represent the surplus proceeds of sale to which they are entitled. It is in fact only under the trusts of clause 18 that the B stockholders are entitled at all. In my opinion the first trust of clause 18 is to pay or retain the costs and expenses, including the B trustees' remuneration, and subject to that the interest and principal are payable to the B stockholders and any surplus to the company.

(1) 12 Ch. D. 361, 364. (2) April 25, 1895. Unreported.

SWINFEN EADY J.
1911
PICCADILLY HOTEL, LIMITED, *In re.*
PAUL *v.* PICCADILLY HOTEL, LIMITED.

The principle of this case as regards lien was really decided in *Debenture Corporation, Ld.* v. *Uttoxeter Brewery, Ld.* (1), though there remuneration was only allowed up to the time the receiver was appointed. In *In re Accles, Ld.* (2) there was no charge of the remuneration corresponding to that in clause 18. Having regard to the wide nature of the language of clause 34 it is not necessary to inquire into the nature of the services (if any) that the B trustees have rendered. The clause contemplates payment of their remuneration even while the company is carrying on the business and continues it until the trusts of the B security are finally wound up. The B trustees have therefore a lien on the 69,000*l.* surplus purchase-moneys. On the same principle they have a lien on the 1968*l.* Consols representing the original receiver's balance and on the 1307*l.* calls paid into Court by the liquidator, both these sums representing property charged by the B security, and subject to the trusts of clause 18.

Solicitors: *Ashurst, Morris, Crisp & Co.; Hartcup & Davis, for W. T. Hartcup, Norwich.*

(1) April 25, 1895. Unreported. 57; 18 Times L. R. 786.
(2) [1902] W. N. 164; 51 W. R.

G. R. A.

In re DEVEREUX.
TOOVEY *v.* PUBLIC TRUSTEE.

[1911 D. 465.]

EVE J.
1911
July 24, 28.

Public Trustee—Administration of Small Estate—Undistributed Part of Larger Estate—"Gross Capital Value" less than 1000*l.—Date for ascertaining Value—Public Trustee Act,* 1906 (6 *Edw.* 7, *c.* 55), *s.* 3—*The Public Trustee Rules,* 1907, *rr.* 14—16.

Sect. 3 of the Public Trustee Act, 1906, applies throughout to the estates of deceased persons, and not to trusts created by settlements.

In the administration of a small estate by the Public Trustee, under s. 3 of the Public Trustee Act, 1906, the date for ascertaining the gross capital value of such an estate, which must be proved to be less than 1000*l.*, is the date of the application to the Public Trustee to assume the administration, and not the date of the death of the deceased:—

Held, therefore, that an estate which, at the death of a deceased, was of the gross capital value of 1281*l.* 10*s.* 2*d.*, but at the date of the application to the Public Trustee had been reduced by partial distribution to 571*l.* 11*s.* 10*d.* Consols, was a small estate within the meaning of the Act.

ADJOURNED SUMMONS.

On July 19, 1908, Caroline Eliza Devereux died intestate, a widow, leaving a daughter, Wilhelmina Bessie Toovey (wife of Henry Edmund Toovey), who resided permanently in the United States of America, and was one of the next of kin of the deceased. On October 13, 1908, letters of administration to the estate of the deceased were granted to the plaintiff, Arthur Toovey, as attorney of Wilhelmina Bessie Toovey, for her use and benefit, until she should come in and apply for letters of administration of the said estate.

The estate of the deceased was sworn as of the gross capital value of 1182*l.* 14*s.* 8*d.*, and in fact realized 1281*l.* 10*s.* 2*d.* gross value. The plaintiff got in and administered the estate so far as was possible, and distributed three one-fifth parts thereof, of 230*l.* 13*s.* 4*d.* each, to three of the next of kin who were of age. There remained two one-fifth parts with accumulated dividends represented by a sum of 571*l.* 11*s.* 10*d.* Consols standing in the

EVE J.
1911
DEVEREUX, *In re.*
TOOVEY *v.* PUBLIC TRUSTEE.

names of the plaintiff and the Law Guarantee Trust and Accident Society, who were his sureties in the administration bond.

There were four infants entitled to the two one-fifth parts of the estate. On January 20, 1911, Alice Todd, as guardian of two of these infants entitled between them to one-fifth of the estate of C. E. Devereux, deceased, requested the Public Trustee to administer the estate of C. E. Devereux, under s. 3 of the Public Trustee Act, 1906. On January 31, 1911, the Public Trustee wrote to the plaintiff saying that in consequence of this application he had undertaken the administration of the estate.

The plaintiff replied to the effect that if the case came within s. 3 of the Act he considered it just such a one as was intended to be covered by the Act, but he could not reconcile the Public Trustee's reading with the wording of the section.

Further correspondence ensued, and on March 7, 1911, a letter was received by the plaintiff from the Public Trustee Office, enclosing the official document signed and sealed by the Public Trustee and dated March 6, 1911, stating that he had undertaken to administer the estate.

The plaintiff desired to test the question whether this estate was a small estate within the meaning of the Act, and whether he was justified in handing it over to the Public Trustee. He accordingly, on April 1, 1911, issued an originating summons under s. 10 of the Public Trustee Act, 1906, asking (1.) whether the estate of C. E. Devereux was one of which the Public Trustee had power to assume the administration under s. 3 of the Public Trustee Act, 1906; (2.) whether the declaration in writing by the Public Trustee of March 6, 1911, whereby he undertook to administer the above-mentioned estate, had any and what operation under the Act.

P. O. Lawrence, K.C., and *R. Roope Reeve*, for the plaintiff. The words "gross capital value" of an estate in s. 3 of the Public Trustee Act, 1906 (1), must be held to mean the value of

(1) Sect. 3, sub-s. 1, provides: "Any person who in the opinion of the Public Trustee would be entitled to apply to the Court for an order for the administration by the Court of an estate, the gross capital value whereof is proved to the satisfaction of the Public Trustee to be less than one thousand pounds, may apply to the Public Trustee to

the whole estate of the deceased, and not merely the undistributed part which the Public Trustee now seeks to administer; and it is an entire misnomer to call this part "the estate." The proper date at which to fix the value of the estate and to ascertain whether it is in fact a "small estate" is the date when the value is first ascertained, namely, on the death of the deceased. Under s. 3, sub-s. 1, the value must be proved to the satisfaction of the Public Trustee to be less than 1000*l.*: the Public Trustee Rules, 1907, rr. 14—16. The decision of Chitty J. in the case of *In re Twigg's Estate* (1) is somewhat analogous, as it was there decided that the Intestates' Estates Act, 1890, did not apply to cases of partial intestacy. That Act, like the portion of the Public Trustee Act now under discussion, was intended to deal with small estates, and not, as the learned judge there said (2), with the case of a millionaire who might have died intestate as to part of his residuary estate.

T. J. C. Tomlin, for the Public Trustee. Sect. 3 of the Public Trustee Act does not apply only to administration of the estates of deceased persons, but would seem to apply also to the execution of the trusts of small estates under 1000*l.* when the beneficiaries entitled are poor. The object of the Act was to provide for poor beneficiaries an inexpensive method of administering their trust funds. With regard to the question whether this is a small estate, the date at which the gross capital value is to be ascertained is the date of the application to the Public Trustee to assume the administration. This is borne out by the wording of s. 3. In sub-s. 1 the words are "the gross capital value whereof is proved to be," and not "to have been," and there is also a provision at the end of that sub-section that the Public Trustee can refuse to administer in any particular case. This is therefore a small estate within the meaning of s. 3 of the Act.

P. O. Lawrence, K.C., in reply. The beneficiaries of a large

---

administer the estate, and, where any such application is made and it appears to the Public Trustee that the persons beneficially entitled are persons of small means, the Public Trustee shall administer the estate, unless he sees good reason for refusing to do so."

(1) [1892] 1 Ch. 579.

(2) Ibid. 582.

EVE J. 1911 DEVEREUX, *In re.* TOOVEY *v.* PUBLIC TRUSTEE.

estate reduced by distribution to less than 1000*l.* might, under the construction contended for, apply to the Public Trustee for the administration of the estate, and he might have to investigate the proceedings of those whom he succeeded. That would be contrary to the intention of the Act. The estate must be one which, from the commencement, was a small estate.

Cur. adv. vult.

July 28. EVE J. delivered the following written judgment:— Caroline Eliza Devereux died intestate on July 19, 1908, possessed of personal estate of the gross capital value of 1200*l.* and upwards. Letters of administration to her estate were granted on October 13, 1908, to Arthur Toovey, who, having paid the funeral and testamentary expenses and debts of the intestate and distributed three-fifths of the net estate to such of the next of kin as were competent to give receipts for the same, stands possessed of the remaining two-fifths in trust for four infant beneficiaries. Such last-mentioned two-fifths is represented by a sum of 571*l.* 11*s.* 10*d.* Consols standing in the joint names of the administrator and his bondsmen. In January last the mother of two of the infant beneficiaries, who are persons of small means, applied to the Public Trustee to undertake the administration of the estate under s. 3 of the Public Trustee Act, 1906, and on March 6 the Public Trustee undertook, by declaration in writing signed and sealed by him, to administer the estate. The administrator is quite willing to facilitate the transfer of the administration to the Public Trustee, but a doubt having been raised whether the case is one which falls within the section above mentioned, this summons has been issued for the purpose of determining the question whether the estate is an estate of which the Public Trustee has power to assume the administration under that section.

Sect. 3, in my opinion, applies throughout to the estates of deceased persons, and has no application to trusts created by settlements which are dealt with in Part (3.) of the Act, commencing with s. 5. The expressions in the section referring to the administration of an estate are used in their strict and

proper sense, and the phrases "proceedings for the administration of an estate" in sub-s. 5 and "an order for the administration by the Court of an estate" in sub-s. 1 mean proceedings and an order for administration, and not for execution of the trusts. This conclusion disposes of the suggestion somewhat hesitatingly put forward on behalf of the Public Trustee that the section authorizes him to assume the administration of any trust where the trust premises are of less value than 1000*l.* and the beneficiaries are persons of small means. But the question still remains what estates fall within the section, and in this particular case within sub-s. 1 thereof. Under the combined effect of that subsection and sub-s. 4 of s. 2, by which he is prohibited from accepting the administration of any estate known or believed by him to be insolvent, the Public Trustee must be satisfied of three things before he undertakes to administer: (1.) that the estate is solvent; (2.) that the gross capital value is less than 1000*l.*; and (3.) that the persons beneficially entitled are persons of small means. No difficulty arises in respect of the first and third of these conditions, but the second raises the point whether, in determining the gross capital value of the estate, regard is to be had to the value at the date of the death or to the value at the date when application is made to the Public Trustee to assume the administration. In the present case the values at the different dates were over 1200*l.* and under 500*l.* respectively, and the answer therefore to the question which date determines the value for the purposes of the Act concludes the inquiry as to the power of the Public Trustee to assume this administration. On the one hand it is urged that what the section is intended to deal with is small estates, that is to say, estates which have been throughout of a gross capital value of less than 1000*l.*, and not the balance up to 999*l.* 19*s.* 11*d.* for the time being remaining undistributed amongst beneficiaries of small means of every estate, however large its original value, and that the proper time for determining whether any particular estate is or is not a small estate within the section is the date at which the value has first to be ascertained and fixed, that is to say, at the death. On the other hand reliance is placed first on the obvious intention of the Legislature to provide by the Act for beneficiaries of small means an easy and inexpensive method of

EVE J.
1911
DEVEREUX, *In re.* TOOVEY *v.* PUBLIC TRUSTEE.

securing the due administration of funds in which they are interested, and secondly upon the wording itself of sub-s. 1, which, it is contended, points in terms to a valuation made at a date contemporaneous with the application, and not at a date antecedent, and possibly long antecedent, thereto. As tending to support the view of those who would fix the date of death as the determining date, it may be said that the estate of which the gross capital value is to be less than 1000*l.* is the estate which the applicant could apply to the Court to administer, and that this necessarily means the whole estate, and, further, that this construction is confirmed by sub-s. 5 of the same section, where the words "small value of the estate" must obviously refer to the estate for the administration whereof proceedings have been instituted. Moreover, it is pointed out that in undertaking the administration of an estate already partially administered the duties of the Public Trustee are not necessarily limited to the administration of that part of the estate which remains to be administered. It may and often must be his duty to investigate and possibly to take the accounts of those whom he supersedes in the administration (see as to this r. 16 of the Public Trustee Rules, 1907), and in such cases he may find himself more or less involved in the administration of an estate of a value out of all proportion to the value of that part of it which remained unadministered when application was made to him to assume the administration. In such conditions, it is submitted, the administration ceases to be the administration of a small estate altogether. It is impossible not to appreciate the cogency of these arguments, but I think there are three provisions in the section which go to shew that they ought not to prevail. First, the concluding words of sub-s. 2 clearly contemplate the intervention of the Public Trustee at any stage of the administration, and after it has been proceeding, it may be for a considerable time; secondly, in sub-s. 1 the expression is "the gross capital value whereof is proved to be," not "to have been"; and, thirdly, by the concluding words of the same subsection the Public Trustee is authorized, if he sees good reason so to do, to refuse to administer in any particular case.

I think the net result of these three provisions is to fix the date

of the application as the date for ascertaining the value and to leave it open to the Public Trustee to refuse to accede to the application in all cases where, from the magnitude of the original estate, or from the complexity of the accounts, or from any other cause, the administration he is asked to undertake cannot legitimately and fairly be described as the administration of a small estate. Upon this construction of the section, which I am bound to say is not inaccurately referred to by a text-writer as one giving rise to questions of considerable perplexity, it is admitted that no good reason exists why the administration should not be undertaken by the Public Trustee, and accordingly I answer the question raised by the summons by declaring that this estate is a small estate within the section.

The letters of administration and the other documents relating to the estate must be handed over to the Public Trustee.

Solicitors: *Moodie & Sons*; *L. J. Fulton.*

G. M.

HALL *v.* BURNELL.

[1911 H. 613.]

Vendor and Purchaser—Specific Performance—Contract—Deposit—Stakeholder—No Express Stipulation as to Forfeiture of Deposit—Implied Term—Default of Purchaser—Rescission of Contract—Forfeiture of Deposit—Practice.

The deposit paid upon a contract between vendor and purchaser is in the nature of an earnest or guarantee for the fulfilment of the contract as well as a part payment of the purchase-money, and a vendor obtaining rescission owing to default in completion by the purchaser is entitled to the deposit, in the absence of any express stipulation to the contrary in the contract.

Howe v. *Smith* (1884) 27 Ch. D. 89, followed.

Jackson v. *De Kadich* [1904] W. N. 168, discussed.

The fact that the deposit is in the hands of stakeholders cannot affect the respective rights of the vendor and purchaser therein.

MOTION.

By an agreement in writing dated October 21, 1910, it was agreed that the plaintiff, William Hall, should sell, and the

EVE J. 1911 HALL v. BURNELL.

defendant, Robert Norman Burnell, should purchase, the fee simple of a parcel of land at Kingston Road, Merton, Surrey, together with six shops erected thereon at the price of 2450*l.*, of which the sum of 50*l.* was, on the signing of the contract, to be paid as a deposit to Messrs. Hughes, Bartlett & Thornton, the plaintiff's solicitors, as stakeholders.

The balance of the purchase-money was to be paid on November 11, 1910, at the office of the plaintiff's solicitors, when the purchase was to be completed. There was no provision in the contract as to the retention of the deposit in the event of any failure to complete by the purchaser. The deposit was paid, the vendor's title accepted by the defendant, and a conveyance of the property approved by both parties.

The defendant made default in completing the purchase, and on February 28, 1911, the plaintiff issued his writ in the action claiming specific performance of the agreement. Appearance was entered by the defendant on March 7, 1911. The statement of claim was delivered on March 25, 1911, claiming damages in addition to or in lieu of specific performance.

On May 2, 1911, Eve J. gave judgment for specific performance of the agreement in default of the defendant delivering a defence, and the defendant was ordered to pay the amount found due. On July 4, 1911, the Master found by his certificate that 2400*l.* was the balance due to the plaintiff, and 41*l.* 6*s.* 2*d.* for costs. Further time was given to the defendant to complete on certain terms, but he neglected to do so. On July 20, 1911, the plaintiff gave notice of motion asking for an order that the agreement of October 21, 1910, be rescinded, and the deposit of 50*l.* forfeited to the plaintiff, and that all further proceedings in the action might be stayed. This notice of motion was served upon the defendant, but he did not appear when the motion came on to be heard on July 31, 1911.

W. E. Greaves, for the motion. The deposit here is a guarantee that the purchaser will complete his bargain, and as he is in default the vendor is entitled to the order asked, on the authority of *Howe* v. *Smith*. (1) It is true that Farwell J. declined

(1) 27 Ch. D. 89.

to make an order that the vendor was entitled to the deposit in the case of *Jackson* v. *De Kadich* (1), but that was under some misapprehension of the facts in *Howe* v. *Smith*. (2) In that case no rescission was asked because the vendor had elected to rescind before, and in fact he resold the property as owner. The cases on the point are collected in Williams on Vendors and Purchasers, 2nd ed. vol. ii. p. 1055, where there is a note as to the cases of *Howe* v. *Smith* (2) and *Jackson* v. *De Kadich*. (1)

In the cases of *Dunn* v. *Vere* (3) and *Olde* v. *Olde* (4) a vendor seeking rescission owing to the default of a purchaser in completing was held entitled to retain the deposit. The fact that it is in the hands of stakeholders cannot make any difference. The vendor is therefore entitled to the order asked, and to a stay of all further proceedings.

EVE J., after stating the facts, continued: The plaintiff in this action moves, as he is now entitled to do, relying upon the default of the defendant, for an order rescinding the contract, and also for a declaration that he is entitled to the 50*l.* in the hands of his solicitors as stakeholders paid by way of deposit, and for a stay of all further proceedings in the action. No difficulty arises except in so far as it relates to the deposit.

The contract contains no express stipulation as to what is to become of the deposit in the event of the purchaser making default. Money paid as a deposit must, however, according to the view expressed by Fry L.J. in *Howe* v. *Smith* (2), be paid on some terms implied or expressed, and in a case where no terms are expressed it becomes necessary to inquire what terms are to be implied. The answer to this inquiry is to be found in the words which follow the statements in the judgment of Fry L.J. to which I have just referred. They are as follows (5): "The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account,

(1) [1904] W. N. 168.
(2) 27 Ch. D. 89.
(3) (1870) 19 W. R. 151.
(4) [1904] 1 Ch. 35.
(5) 27 Ch. D. 101.

EVE J.
1911
HALL
v.
BURNELL.

but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payee to perform the rest of the contract." To the same effect are the observations of Cotton L.J., where he says (1): "What is the deposit? The deposit, as I understand it, and, using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit"; and Bowen L.J. (2), after remarking "We have therefore to consider what in ordinary parlance, and as used in an ordinary contract of sale, is the meaning which business persons would attach to the term 'deposit,'" adds by way of answer, "it comes shortly to this, that a deposit, if nothing more is said about it, is, according to the ordinary interpretation of business men, a security for the completion of the purchase."

The Lords Justices were there speaking of a case where the deposit was actually paid to the vendor, but I cannot conceive that the mere fact that the money is placed for the time being in the hands of a third party as stakeholder would be treated as altering the nature of the deposit, or the implied terms upon which the money is paid by the purchaser. Whether it be paid to the vendor direct, or to a third party as stakeholder, the implication, in the absence of any other element of difference, must in each case be the same. Such being the nature of the deposit and the implied terms upon which it was paid, is there any sufficient reason why I should not, as against a purchaser who has receded from and persistently refused to perform the contract, declare that the deposit has been forfeited and belongs to the vendor, who has been in no way in default and has done everything in his power to force the purchaser to

(1) 27 Ch. D. 95. (2) 27 Ch. D. 98.

carry out his bargain? I think not. The deposit cannot be left indefinitely in the hands of the stakeholder, and the only alternative to its being paid to the vendor is its return to the purchaser. But the decision in *Howe* v. *Smith* (1) negatives the purchaser's right to recover it when paid to the vendor in a case where the purchaser has repudiated the contract, and establishes the right of the vendor in such circumstances to retain it. From this it would seem to follow that in a case like the present, where the money is in the hands of a third party, the Court ought to make such an order as will ensure to the vendor payment of that which he would, on the authority of *Howe* v. *Smith* (1), be entitled to retain if it were already in his hands. It is true that in the case before Farwell J. of *Jackson* v. *De Kadich* (2), where the facts were very similar to those of the present case, he declined to make an order declaring the vendor entitled to the deposit in the hands of the auctioneers, and in so doing pointed out that the claim for rescission was inconsistent with the claim for damages for breach of the contract; and he made the further observation that in *Howe* v. *Smith* (1) there was in fact no rescission. But, as is pointed out by Mr. Cyprian Williams in an instructive note at p. 1055 of vol. ii. of Williams on Vendor and Purchaser (2nd ed.), there had in fact been rescission in *Howe* v. *Smith* (1), for, as appears on p. 90 of the report, the vendor, before delivering his defence in the purchaser's action for specific performance, had resold the property, and in his defence he relied on the plaintiff's delay as justifying rescission of the contract, and in Fry L.J.'s judgment (3) it is made quite clear that the vendor had, prior to such resale, justifiably elected to treat the contract as rescinded, and had sold under his absolute title, and not under a clause in the contract authorizing him to resell on the purchaser's default. The case was therefore one in which the vendor was held entitled to rescind the contract and at the same time to retain the deposit.

It would appear from the report of *Jackson* v. *De Kadich* (2) that these matters were not fully brought to the attention of the

(1) 27 Ch. D. 89. (2) [1904] W. N. 168.
(3) 27 Ch. D. 104, 105.

EVE J.
1911
HALL
v.
BURNELL.

learned judge, and it may be that these considerations have had something to do with the case never having been reported except in the form of a weekly note, but, however this may be, I think I am justified in saying that *Howe* v. *Smith* (1) does amount to the authority for which the learned judge was asking in *Jackson* v. *De Kadich* (2) and I am entitled to hold that it establishes that there is nothing inconsistent in a vendor being given relief by way of rescission and at the same time, in the absence of express stipulation to the contrary, being allowed to retain the deposit. The judgment in *Jackson* v. *De Kadich* (2) did not in any way bear on the fact that the money there was in the hands of stakeholders, and, as I have already stated, that fact alone cannot in my opinion alter or affect the respective rights of the vendor and purchaser therein. I propose, therefore, to make the order as asked, and the purchaser, who has had due notice of this application but has not come here to shew cause why the vendor should not get the whole relief for which he asks, must pay the costs; and there will be a stay of the other proceedings in the action.

Solicitors: *Hughes, Bartlett & Thornton; Withall & Withall.*

(1) 27 Ch. D. 89. (2) [1904] W. N. 168.

G. M.

In re METER CABS, LIMITED.

SWINFEN EADY J.

[0073 of 1910.]

1911

Solicitor—Lien—Common Law Lien—Property recovered—Arbitration—Claim by Company—Winding-up—Continuance of Arbitration—Compromise—Costs prior to Liquidation—Costs of establishing Retainer by Liquidators. *Oct.* 25, 26.

A limited company employed a solicitor to establish a claim in an arbitration. Pending the arbitration the company went into liquidation, and, shortly after, the solicitor with the sanction of both liquidators compromised the claim for 29*l.* which was paid to him and credited to the liquidators:—

Held, that as the 29*l.* was recovered by the exertions of the solicitor in the arbitration he had a common law lien thereon for his costs of recovery, including the costs incurred prior to the liquidation.

Jones v. *Turnbull* (1837) 2 M. & W. 601, *Emden* v. *Carte* (1881) 19 Ch. D. 311, and *Guy* v. *Churchill* (1887) 35 Ch. D. 489 (bankruptcy cases); and *In re Massey* (1870) L. R. 9 Eq. 367, and *In re Born* [1900] 2 Ch. 433 (company cases), applied.

Held, also, that the solicitor's lien extended to the costs of establishing his retainer against one of the liquidators who disputed it.

In re Hill (1886) 33 Ch. D. 266, applied.

SUMMONS.

This was a summons in the winding-up of the above company to determine (inter alia) whether a bill of costs for 23*l.* delivered to the liquidators by Walker, a solicitor, was properly payable out of the assets of the company, and, if properly payable, for an order for taxation and payment. Walker submitted to taxation.

In October, 1909, the Meter Cabs Company were seeking to enforce a claim against an insurance company on a policy guaranteeing the fidelity of an employee. Walker acted as solicitor for the Meter Cabs Company. By an order of November 5, 1909, an arbitrator was appointed under the submission contained in the policy. Walker acted for the Meter Cabs Company in the arbitration. On January 18, 1910, the insurance company, at whose request the arbitration had been postponed, paid the Meter Cabs Company an instalment of 45*l.* on account of the claim, and this admittedly became part of their general assets.

On January 29, 1910, the Meter Cabs Company went into

SWINFEN EADY J.

1911

METER CABS, LIMITED, *In re.*

voluntary liquidation and Murgatroyd was appointed sole liquidator. On January 31, 1910, Walker attended Murgatroyd, who arranged to consider as to proceeding with the arbitration. On March 15, 1910, a consent order was made appointing Corfield joint liquidator with Murgatroyd. On March 17, 1910, the committee of inspection appointed Messrs. Harris, Chetham & Cohen solicitors to the liquidators. On March 22, 1910, Murgatroyd instructed Walker to continue the proceedings in the arbitration. On March 22, 1910, Walker wrote to the insurance company, who had gone into voluntary liquidation, suggesting that they should make an offer in settlement of the claim. On April 9, 1910, the insurance company wrote to Walker offering 19*l.* in settlement. On April 11, 1910, Walker enclosed a copy of the insurance company's letter to Murgatroyd and asked for instructions. On April 13, 1910, Murgatroyd having, as the Court held on the evidence, obtained Corfield's sanction, instructed Walker on behalf of both liquidators to accept the offer of 19*l.* and if possible to obtain a payment on account of costs. Acting on these instructions, Walker accepted the 19*l.* and obtained 10*l.* for costs. The sum of 29*l.* was paid to him on June 9, 1910, and credited by him to the liquidators.

On September 22, 1910, Walker delivered his bill of costs in this matter, amounting to 23*l.*, of which 20*l.* was incurred before the liquidation. He claimed a common law lien on the 29*l.* for his costs when taxed, on the ground that it had been recovered by his exertions in the arbitration. As, however, Corfield, besides disputing the fact that he had given Walker any retainer, took the view that Walker was only entitled to a right of proof in respect of the costs incurred before the liquidation, this summons was issued to determine the point.

Giveen, for Corfield. At the date of the liquidation Walker had a claim for 20*l.* costs against the company. For this claim he had merely a right of proof. If the liquidators had employed a fresh solicitor to act in the arbitration, Walker would have had no lien on the 29*l.* subsequently recovered. Surely the fact that they employed Walker does not give him a lien for the prior costs. Suppose towards the end of an action, when most of the

costs have been incurred, the plaintiff becomes bankrupt, and his trustee, instead of employing a fresh solicitor, instructs the original solicitor to continue the proceedings, surely the solicitor does not acquire a lien on the amount recovered for all his costs prior to the bankruptcy.

Harman, for Walker and Murgatroyd. Walker has a common law lien on the 29*l.* recovered by his exertions in the arbitration: *Ormerod* v. *Tate* (1); *Lord* v. *Colvin* (2); Cordery on Solicitors, 3rd ed. p. 374; Atkinson on Solicitors' Liens, p. 10. The liquidators, who were agents for the company,—*In re Anglo-Moravian Hungarian Junction Ry. Co.* (3)—must be taken to have adopted the arbitration proceedings ab initio: *In re London Drapery Stores.* (4) Walker has therefore a lien for all his costs.

Giveen in reply.

Cur. adv. vult.

Oct. 26. SWINFEN EADY J. (after stating the facts and holding that Walker's retainer was authorized by Corfield). The result of the evidence is that the 29*l.* was accepted in satisfaction of the arbitration claim and paid to Walker with the authority of both the liquidators. He gives credit for the 29*l.* in his bill of costs, which amounts to 23*l.* It is nevertheless urged that with regard to the 20*l.* costs incurred before the liquidation Walker has merely a right of proof and no right of retainer.

It is clear that at common law a solicitor is entitled to a particular lien, which is capable of being actively enforced, on a fund or on the fruits of a judgment recovered by his exertions for the costs of recovery, or those immediately incidental thereto. In this case the proceedings were by arbitration, so that there is no question of any statutory charge under the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28.

Now the common law lien prevails notwithstanding the bankruptcy of the client. There are many authorities to this effect.

In *Jones* v. *Turnbull* (5) an uncertificated bankrupt brought an action for repairs done by him after his bankruptcy. The

(1) (1801) 1 East, 464.
(2) (1862) 2 Dr. & Sm. 82, 92.
(3) (1875) 1 Ch. D. 130, 133.
(4) [1898] 2 Ch. 684.
(5) 2 M. & W. 601, 602.

SWINFEN EADY J.
1911
METER CABS, LIMITED, *In re.*

amount was not actually due at the time of the action and he was nonsuited. The amount due having been ascertained by a reference in the action, the assignees intervened and claimed the money, in consequence of which the defendant refused to pay the plaintiff. The plaintiff thereupon brought a fresh action, and on an interpleader rule his attorneys claimed a lien against the assignees for the amount of their bill. The Court said: "It is clear that the assignees ought not to receive this money without satisfying the lien of the attorneys; it is an equitable right as against them, who have the benefit of the claim, which has been rendered productive by the services of the bankrupt."

In *Emden* v. *Carte* (1) an undischarged bankrupt, without the knowledge of his trustee, brought an action for work done. The defendant paid 360*l.* into Court without admitting liability. The trustee having intervened before the money was paid out, the Court of Appeal held that the bankrupt's solicitor was entitled to a charging order for his costs up to the time of the trustee's intervention.

In *Guy* v. *Churchill* (2) the plaintiffs' action was dismissed with costs, which were taxed at 298*l.* and paid. The judgment was reversed on appeal. The defendants were ordered to repay the 298*l.* and to pay the plaintiffs' costs of the appeal, which were taxed as between party and party at 165*l.* Between the trial of the action and the hearing of the appeal the plaintiffs had become bankrupt. It was held on the application of the plaintiffs' solicitors that, in addition to their right to the 165*l.* party and party costs, they were entitled to a lien on the 298*l.* for the difference between the 165*l.* and the plaintiffs' costs of the appeal taxed as between solicitor and client. Cotton L.J. said: "The lien of a solicitor is grounded on the principle that it is not just that the client should get the benefit of the solicitor's labour without paying for it. Here the official receiver wishes to get the benefit of the solicitors' exertions by which the 298*l.* has been recovered, without paying for them." Lindley L.J. said: "I agree and have nothing to add. It is right that they who get the benefit of the recovery of money should bear the expense of recovering it"; and

(1) 19 Ch. D. 311. (2) 35 Ch. D. 489, 491, 492.

Bowen L.J. said: "I am of the same opinion. The 298*l.* is the fruit of the exertions of the applicants."

These were bankruptcy cases, but the same principle applies to a company in liquidation.

In Buckley on Companies, 9th ed. p. 398, it is stated that "The solicitor to the liquidator is, semble, entitled to a lien for his costs on a fund recovered in the winding-up through his instrumentality." This passage is founded on *In re Massey*. (1) In that case a shareholder, Kent, had instituted a suit against a company in liquidation to be relieved of his shares, and upon the dismissal of his bill had paid the liquidator 400*l.* in accordance with the terms of a compromise sanctioned by the Court in an action for calls. The liquidator's solicitor claimed a lien, and Lord Romilly M.R. said: "Where there is a suit such as that of *Kent* v. *Freehold Land and Brickmaking Company* (2), by means of which a fund is recovered to the company, then the solicitor is entitled to claim a lien for his costs on that fund against every one."

The present case is really covered by *In re Born*. (3) In that case solicitors were employed by a limited company to establish a claim against an estate in course of administration by the Court. The claim was admitted and certified, but had not been paid. The company subsequently went into compulsory liquidation. The solicitors applied for a charging order on the company's share of the fund in Court in the administration action. Farwell J. made the order on the ground that as the solicitors already had a common law lien, he was not giving them a new right, but merely enabling them to enforce a right they already had. The head-note states that "Solicitors employed by a limited company recovered a claim against an estate in course of administration by the Court. The company was subsequently wound up by the Court. Shortly after the winding-up order was made, the solicitors applied for an order charging their costs on the company's share of the fund in Court to the credit of the administration action:—Held, that, as the charging order in

(1) L. R. 9 Eq. 367; 18 W. R. 444.

(2) (1867) L. R. 4 Eq. 588; (1868) 3 Ch. 493.

(3) [1900] 2 Ch. 433, 435.

SWINFEN EADY J.
1911
METER CABS, LIMITED, *In re.*

this case conferred no new right, but was only a cheap and speedy mode of enforcing the common law lien on the company's share of the fund in Court, which lien existed prior to the winding-up, the Court, in the exercise of its discretion under the statute, would make the order." Farwell J. said: "It is also contended that, having regard to the winding-up, I ought not now to give the applicants a charge under the statute. But though this application is under the statute, it is very material to consider whether, if I make a charging order, I am thereby giving the applicants a new right, or merely enabling them more cheaply and speedily to enforce a right they already possess. Now, it is plain that they have a common law lien on the company's share of the fund in Court for the amount of their costs. It would be monstrous if this were not so, as the company would never have recovered the money without their exertions. It resembles the case of debenture-holders who have to allow a liquidator's costs when they take the benefit of his exertions, and it is clear that justice calls for such a lien." This is entirely applicable to the present case. The 29*l.* was recovered by the exertions of the solicitor in the arbitration. It is true that in *In re Born* (1) the money was in Court, while here it is in the solicitor's hands. But that is perfectly immaterial. His right of lien extends to the costs of establishing the claim in the arbitration.

His right of lien also extends to the costs of this application in which his retainer has been established. This was decided by the Court of Appeal in *In re Hill.* (2)

I therefore decide that Walker has a lien on the 29*l.* for his bill and the costs of this application.

Solicitors: *Harris, Chetham & Cohen; Sharpe, Pritchard & Co., for Wm. Walker, Manchester.*

(1) [1900] 2 Ch. 433. (2) 33 Ch. D. 266.

G. R. A.

EVE J.
1911
June 14.

In re WILLIS.
SPENCER *v.* WILLIS.

[1910 W. 1744.]

Will—Construction — Specific Devise of Freehold House and Premises "in which I now reside"—Purchase of adjoining Plots subsequent to Date of Will—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 24—*Contrary Intention—Trustees —Investment—Power to invest in Preference Stock—Fully-paid Preference Shares not within Power.*

By his will dated in 1885 a testator devised to his wife "all that my freehold house and premises situate at Oakleigh Park, Whetstone, in the county of Middlesex, and known as 'Ankerwyke,' and in which I now reside." The testator died in 1901, and between the date of his will and his death he purchased two plots of adjoining land, one contiguous to his house and the other on the opposite side of the road, using them in connection with his house, and with another plot bought before the date of his will:—

Held, that the expression "and in which I now reside" was a mere additional description of the property and not a vital and essential part of the description having the effect of cutting down the generality of the earlier words, and that what passed under the gift was the house and premises known as "Ankerwyke" at the date of the testator's death.

Held, also, on the facts, that the devise included the plots bought subsequently to the date of the will.

By his will the testator also empowered his trustees to invest any part of the trust estate upon "the debentures or debenture stock, or preference stock of any railway or other company in the United Kingdom":—

Held, that inasmuch as there was a distinction, although a minute one, between the two classes of investments described as preference stock and preference shares, it was not within the power of the trustees to invest any part of the trust estate in the fully-paid preference shares of any joint stock company.

ADJOURNED SUMMONS.

By his will, dated December 1, 1885, Herbert Edwin Willis appointed Alfred Sidney Cornwall and Samuel Spencer executors and trustees of his will, and after giving to his wife, the defendant Harriet Willis, certain legacies, he devised to his said wife, her heirs and assigns, "all that my freehold house and premises

EVE J.
1911
WILLIS, *In re.* SPENCER *v.* WILLIS.

situate at Oakleigh Park, Whetstone, in the county of Middlesex, and known as 'Ankerwyke,' and in which I now reside, subject to any mortgage subsisting thereon, to hold unto my said wife, her heirs and assigns, for ever"; and as to all his residuary estate, real and personal, the testator devised and bequeathed the same to his trustees upon trust for sale as therein mentioned and to stand possessed of the proceeds thereof upon trust to pay the income to his wife for life, or until she should marry again, and after the death or second marriage of his wife, he directed the trustees to stand possessed of the trust estate and the income thereof in trust for his children on attaining twenty-one or marrying, and, in default of any child living to attain a vested interest, in trust to pay the income of the trust estate to his wife for the remainder of her life, and after her decease upon trust, as to the capital and income, for such one or more of his brothers, William Edward Willis and Walter Willis, as should be living at his decease; and the testator declared that his trustees should be at liberty to invest any part of the trust estate upon Government funds, upon mortgage, or upon "the debentures or debenture stock, or preference stock of any railway or other company in the United Kingdom."

By a codicil made in 1889 the testator substituted one of the plaintiffs as executor and trustee in the place of A. S. Cornwall, and in other respects confirmed his said will.

The testator died on July 30, 1901, and his will and codicil were proved by the plaintiffs, the present executors and trustees. The testator's brother William Edward Willis predeceased him. The testator's widow had not married again. There was no issue of the testator.

From the evidence it appeared that the testator built the house called "Ankerwyke" upon a plot of land (marked "A" on a plan) demised to him on June 24, 1881, for a term of ninety-nine years; and on February 5, 1884, the said land and house were conveyed to the testator in fee simple by the London and County Land and Building Company, Limited. At the time of the purchase there were open fields opposite the house on the other side of Oakleigh Park Road, but shortly afterwards the London and County Land and Building Company, Limited, who were the

owners of the whole estate, proceeded to dispose of the land for building purposes, and the testator thereupon purchased a plot of land (marked "D" on plan) on the opposite side of the road to his house, and this was conveyed to him by a deed of July 31, 1885, before the date of his will. This new plot was converted into a garden by the testator, and a tennis lawn made, the whole being used in conjunction with the house "Ankerwyke," the entrance being by means of a gate opposite to his own entrance gate. On June 3, 1898, the testator purchased a house and land called "The Woodlands," adjoining "Ankerwyke," on the same side of Oakleigh Park Road, and he cut off a part of the garden of "The Woodlands" and threw it into that of "Ankerwyke" (marked "B" on plan). On November 2, 1898, the testator purchased another plot of land (marked "E" on plan) on the opposite side of the road to part of "The Woodlands," and threw it and the piece formerly acquired ("D") into one, and made a paddock and small stable to be used in conjunction with "Ankerwyke." Part of these lands in the occupation of the testator was mortgaged by separate deeds. The testator occupied all these four plots until his death.

After the testator's death the trustees invested a sum of 800*l.* 12*s.* in the purchase of 700*l.* preference shares of the Hovis Bread Flour Company, Limited, and the question was raised by the residuary legatee, Walter Willis, whether this investment was within the powers of the trustees. An originating summons was accordingly taken out by the executors and trustees for the determination of the questions, (1.) whether the devise to the defendant Harriet Willis of "all that my freehold house and premises situate at Oakleigh Park, Whetstone, in the county of Middlesex, and known as 'Ankerwyke,' and in which I now reside" passed as well the said house and piece of land on which the same was erected, as also the other three plots "B," "D," and "E," or whether the said pieces of land, or either of them, passed under the residuary devise; (2.) whether, under the power in the will for the trustees to invest in "the debentures or debenture stock or preference stocks of any railway or other company in the United Kingdom," the plaintiffs were entitled to invest in fully-paid preference shares of the proposed company, or in any other

EVE J. 1911 — WILLIS, *In re.* SPENCER *v.* WILLIS.

company registered under the Companies Act, 1862, or subsequent Companies Acts.

J. W. F. Beaumont, for the trustees.

Cozens-Hardy, for the specific devisee. The question is what passed under the expression "the house and premises known as 'Ankerwyke.'" According to s. 24 of the Wills Act, 1837, the will, as regards the property comprised in it, is to be construed as speaking from the date of the testator's death. I ask the Court to neglect the words "and in which I now reside"; they are merely an additional description. One of the plots in question, "D," was purchased before the date of the will, and the other plots subsequently acquired were, on the evidence, commonly known as "Ankerwyke" and were used and enjoyed with the house. Some meaning must also be given to the words "and premises." In *Lethbridge* v. *Lethbridge* (1) the words "mansion house, gardens, and premises" were held to include a park of about 100 acres. It is true that on a further hearing of the case (2) an adjoining farm was held not to be included in the words, but the farm was unnecessary for the convenient occupation of the mansion house. In the present case I submit that the four plots which are used together and are known as "Ankerwyke" pass to the specific devisee.

A. F. C. Luxmoore, for the residuary devisee. There are two points to be considered: (1.) What meaning is to be attached to the words "in which I now reside"? Is it at the date of the will or at the date of the death? (2.) What is the meaning of "house and premises" in this specific devise? On the first point it is submitted that s. 24 of the Wills Act does not apply, as there is a contrary intention expressed in the will. A specific devise is, in itself, a sufficient contrary intention: *Sidney* v. *Sidney* (3), where Sir George Jessel M.R. said that "The first duty of the Court is to ascertain what the will meant." In the present case the words "now reside" are an important and an essential part of the description. They

(1) (1861) 3 D. F. & J. 523. (2) (1862) 4 D. F. & J. 35.
(3) (1873) L. R. 17 Eq. 65, 68.

mean at the date of the will: *In re Portal and Lamb* (1); *In re Edwards.* (2) The Wills Act does not therefore apply, as the question is whether this specific property passes by the specific or by the residuary devise. I therefore claim the plots "B" and "E" for the residuary devisee.

The second point is whether "D," which was purchased before the date of the will, is included in the term "house and premises." That expression means the house and all that is necessary for the occupation and enjoyment of the house, not what is necessary for the enjoyment and use of the occupier of the house. The tennis court and garden on the other side of the road were not necessary for the convenient enjoyment of the house, as was said of the farm in the case of *Lethbridge* v. *Lethbridge.* (3) *Steele* v. *Midland Ry. Co.* (4) also assists my contention. On the construction of the will, therefore, only "A" on the plan passes under the specific devise, and "B," "D," and "E" go under the residuary gift.

Cozens-Hardy in reply on the cases cited. The word "now" in the will must be read as at the moment of death, and it is not a sufficient indication of a contrary intention to take the case out of the Wills Act: *In re Ord* (5); *In re Midland Ry. Co.* (6)

The words as to residence are only descriptive, not a limitation or a qualification of the earlier words: Jarman on Wills, 6th ed. vol. i. p. 511; Theobald on Wills, 7th ed. p. 146. In the case of *In re Champion* (7) the words were very similar, as there was a devise of house and land "now in my own occupation," and North J. held those words to be a mere additional description, not vital, and not essential. Here there was a sufficient description of the property without these added words.

A. F. C. Luxmoore. In *In re Champion* (7) the property in question there was purchased after the date of the will, but before a codicil confirming the will; and the decision in the Court of Appeal turned upon the effect of the codicil.

(1) (1885) 30 Ch. D. 50.
(2) (1890) 63 L. T. 481.
(3) 4 D. F. & J. 35, 39.
(4) (1866) L. R. 1 Ch. 275.
(5) (1879) 12 Ch. D. 22.
(6) (1865) 34 Beav. 525.
(7) [1893] 1 Ch. 101, 107.

EVE J.
1911
WILLIS, *In re.* SPENCER *v.* WILLIS.

EVE J. I am much obliged to counsel for the able manner in which their arguments have been put before me. By his will dated in 1885 the testator devised to his wife "all that my freehold house and premises situate at Oakleigh Park, Whetstone, in the county of Middlesex, and known as 'Ankerwyke,' and in which I now reside, subject to any mortgage subsisting thereon." He died in 1901, and in the interval between the making of his will and his death he added to the property known as "Ankerwyke" by purchasing two plots of adjoining land. One of these plots, that marked "B" on the plan, was contiguous to the one on which his house was built; the other (marked "E") was on the opposite side of the road. The first question is one of construction: Is the gift of the house and premises limited to that part of the property which constituted the house and premises in the occupation of the testator at the date of the will, or does it extend to include all that constituted the house and premises at the date of the testator's death?

The answer to that question depends upon this, whether the expression "and in which I now reside" is an essential part of the gift, or is simply added as an additional description, inaccurate at the date when the will came into operation, and not effective to cut down the generality of the earlier words. I confess that after hearing Mr. Luxmoore's argument I was inclined to adopt the view that the expression was an essential part of the gift, limiting it to so much of the property known as "Ankerwyke" as was in the occupation of the testator at the date of his will.

But in the course of his reply Mr. Cozens-Hardy has drawn my attention to the case of *In re Champion* (1), and having read the judgment of North J. in that case, and in particular the observations made by him at p. 107 upon a devise which can hardly be distinguished in its terms from the present, I feel bound to modify the opinion I at first entertained, and to hold that the words are a mere additional description of the property and are not a vital or essential part of the description having the effect of cutting down the generality of the earlier words. In my opinion, therefore, that which passes under the gift is the

(1) [1893] 1 Ch. 101, 107.

house and premises known as "Ankerwyke" at the date of the testator's death.

Then comes the second question, what is the subject-matter of that gift? The material facts appear in the several affidavits filed on the summons.

The testator originally purchased a plot of building land on the east side of Oakleigh Park Road, and upon this in 1885 he erected a dwelling-house. Within a few months of so doing he purchased a plot on the opposite side of the road in order to prevent the erection of a house there, and, as one would naturally expect him to do, converted it into an ornamental garden, wherein he also made a tennis lawn. [His Lordship then dealt with the purchases of the other two plots, and continued.] At the time of his death, and for many years prior thereto, the testator was in occupation of the whole of these four plots. In his will he devises "all that my freehold house and premises known as 'Ankerwyke.'" It comes then to be a question of fact, what was known as "Ankerwyke" at the date of the testator's death? If the devise had been simply a devise of the "house," according to the decision in *Steele* v. *Midland Ry. Co.* (1), that description would have passed all that was necessary for the convenient use and occupation of the house.

But the devise is not limited to the word "house"; there are also the words "and premises." I think the word "house" alone would have justified me in holding that plots "A" and "B" on the plan passed, and giving as I must do some meaning to the added words (regard also being had to the use which the testator made of the land), I think the devise includes also plots "D" and "E." I hold, therefore, on the true construction of the will, that the devisee takes the whole of the four plots, "A," "B," "D," and "E."

The second question raised by the summons, as to the propriety of the investment in preference shares, was then argued.

J. W. F. Beaumont, for the trustees. The words "any other company" mean any company incorporated under the Companies Acts and not necessarily a public company of the same character

(1) L. R. 1 Ch. 275.

EVE J.
1911
WILLIS, *In re.*
SPENCER *v.* WILLIS.

as a railway or canal company: *In re Sharp.* (1) In that case there were the words "railway or other public company," and yet it was held that investments in certain companies incorporated under the Companies Acts were within the power.

Fully-paid preference shares are substantially in the same position as preference stock; the holders have similar rights. The ratio decidendi in the case of *Morrice* v. *Aylmer* (2) applies here. In that case stock in a railway company was held to pass under a bequest in a will of shares in a railway company. Under the Companies Consolidation Act, 1908, s. 41, there is power to convert paid-up shares into stock, and for the purposes of that Act there is no real distinction between them.

In *Henderson* v. *Henderson's Trustees* (3) it was held by Lord Pearson that a power to invest in stocks included a power to invest in fully-paid shares, and that part of his decision was not dealt with on appeal. The trustees, it is submitted, may properly make the proposed investment.

A. F. C. Luxmoore, for the residuary legatee. There may be little substantial difference between preference stock and preference shares, but they are not the same thing. They belong to different classes of investment. *Morrice* v. *Aylmer* (2) is distinguishable from the present case; it was a question there as to what passed under a bequest in a will, and a more benevolent construction is put upon such a bequest than upon the construction of a power to invest. It must be construed strictly. In the Trustee Act, 1893, there is power given by s. 1 to invest in numerous funds of stock, but shares are not mentioned. Then by s. 50 of the Act the expression "stock" is defined to include fully paid up shares. So that but for that express definition it would not do so. There is an obvious distinction between stock and shares, as is pointed out in *Henderson* v. *Henderson's Trustees* (3), and a power to invest in one does not enable the trustees to invest in either.

EVE J. The testator by his will empowered his trustees to invest any part of the trust estate upon "Government funds,

(1) (1890) 45 Ch. D. 286. (2) (1875) L. R. 7 H. L. 717.
(3) (1900) 37 S. L. R. 976.

upon mortgage of freehold, copyhold, or long leasehold property in England or Wales, upon debentures or debenture stock, or preference stock of any railway or other company in the United Kingdom." It is conceded that under that power it is open to the trustees to invest in or upon debenture stock, or preference stock of any company incorporated under the Joint Stock Companies Acts. But the point remains whether the power authorizing the trustees to invest in the preference stock authorizes the investment in fully-paid preference shares of any such company. I do not think, in construing this clause in the will, that much assistance is to be obtained from the consideration of cases where the question has been whether preference stock has passed under a bequest of preference shares, or preference shares under a bequest of preference stock. The proper way to approach the question is to consider whether there is a class of investment known and described as preference stock, distinct and different from a class of investment known and described as fully-paid preference shares. If once the conclusion is arrived at that there are the two distinct classes of investment, I do not think the Court ought to assume that a testator who in terms authorizes his trustees to invest in the one class intended them to invest in both classes, notwithstanding that the difference in the essential attributes of the two classes may be so slight as to be accurately described as minute. Upon these points I adopt what Lord Pearson said in *Henderson* v. *Henderson's Trustees* (1), that there is an obvious distinction between preference stock and preference shares, and that the distinction, though obvious, is minute. But in my opinion it is a distinction sufficient to warrant me in holding that a power to invest in preference stock is not equivalent to a power to invest in preference stock, or fully-paid preference shares. I must, therefore, answer the second question by saying that it is not within the power of the trustees to invest any part of the trust estate in the fully-paid preference shares of any joint stock company.

Solicitors: *Tippetts ; Woodcock Ryland & Parker.*

(1) 37 S. L. R. 976, 980.

G. M.

C. A.
1911

SWINFEN EADY J.
June 16, 19, 20, 21; *July* 11.

C. A.
Nov. 10, 13, 14.

COLEMAN & CO., LIMITED *v.* STEPHEN SMITH & CO., LIMITED.

[1910 C. 1964.]

In re REGISTERED TRADE MARK "CARVINO."

Trade Mark—Rectification of Register—Removal of Mark—Actual Mark not calculated to deceive—User on Goods with deceptive Get-up — Proper Remedy—Passing-off Action—Account of Profits—Stay of Account pending Appeal—Practice.

Where a word registered as a trade mark is not in itself calculated to deceive, but is used on goods in connection with and as part of a deceptive get-up, the Court, even if it restrains the get-up in a passing-off action, will refuse a motion to remove the mark from the register.

In re Christiansen's Trade Mark (1886) 3 Rep. Pat. Cas. 54, 63, and *In re Worthington & Co.'s Trade Mark* (1880) 14 Ch. D. 8, applied.

An account of profits in a passing-off action will not be stayed pending an appeal, unless irreparable injury would otherwise be caused.

Nerot v. *Burnand* (1826) 2 Russ. 56, and *Hyam* v. *Terry* (1880) 29 W. R. 32, applied.

On appeal, the decision of Swinfen Eady J. in the passing-off action was reversed; and a cross-appeal by the plaintiffs from the refusal to rectify the register was dismissed.

ACTION AND MOTION.

This was an action to restrain the defendants from selling their meat wine "Carvino" with a get-up calculated to lead to the belief that it was the plaintiffs' meat wine "Wincarnis," and a motion to remove the mark "Carvino" from the register.

In September, 1908, the defendants, who for about eleven years had made and sold an extract of meat and malt wine under the successive names of "Liebig's Extract of Meat and Malt Wine," "Keystone Beef Wine," and from 1906 as "Liebig's Extract of Meat and Malt Wine prepared with Lemco," applied to register the word "Carvino" as their trade mark in class 3, "Chemical substances prepared for use in medicine and pharmacy," and class 43, "Fermented liquors and spirits."

This application was opposed by the plaintiffs, who for about nineteen years had made and sold a meat and malt wine under the name "Wincarnis." In 1889 they had registered this name

as their trade mark in class 3 and class 42, "Substances used in food or ingredients in food," and in 1898 in class 43. Their opposition was based on the ground that the word "Carvino" was so similar to "Wincarnis" as to be calculated to deceive. The registrar did not take this view, and on June 17, 1909, he ordered the registration to proceed, suspending the registration for one month to enable the plaintiffs to appeal, and in the event of an appeal until the appeal was determined. The plaintiffs did not appeal, and the mark Carvino was in due course registered and used by the defendants for their meat and malt wine.

The defendants then sold their Carvino with a get-up closely resembling the plaintiffs' get-up.

The plaintiffs had always used champagne-shaped bottles wrapped in pink paper wrappers on the front of which were three white rectangular labels with black border lines.

The small neck label bore the word "Coleman's" in black letters. This had been recently abandoned.

Beneath this was a small label with "Wincarnis" in large white letters on a black ground, and the statement "Name registered to prevent fraudulent imitations" in small black letters.

Beneath this was a large label bearing the words "Coleman's Wincarnis" in large black letters, "Coleman & Co. Lim. Norwich" in black letters enclosed within an inner black border line at the foot of the label, and "Coleman's Wincarnis" in red letters diagonally across the label. These labels were about the same distance from each other.

The defendants used similar bottles and pink wrappers with three white rectangular labels in front arranged like the plaintiffs' at similar distances from each other. The small labels had a black border line, and the large a gold border line.

The small neck label bore the word "Carvino" in large white letters on a black ground with the statement "Prepared with Lemco under exclusive licence from the Liebig's Extract of Meat Co. Lim." in very small black letters. The similar neck label previously used since 1906 bore the statement "This meat and malt wine is prepared with Lemco under exclusive licence etc.," the word Lemco being printed in large white letters on a black ground and the rest of the statement in black letters.

C. A. 1911

"CARVINO" TRADE MARK, *In re.*

Underneath this was a small label with "New name" in large black letters and the statement "Registered to prevent fraudulent imitations" in small black letters.

Beneath this was a large label bearing the word Carvino in large gold letters and "Liebig's Extract of Meat and Malt Wine" in dark blue letters. Below these words on the left was the defendants' keystone trade mark in red with their signature across it diagonally in dark blue letters. On the right of the keystone were the words "The only wine prepared with Lemco" in red letters. The rest of this label was in dark blue letters, as follows: "This trade mark is a guarantee that Lemco only is used in this preparation under exclusive licence from Liebig's Extract of Meat Company Limited." Below this was the defendants' name and address "Stephen Smith & Co. Lim., Bow, London E.," and below this in very small letters outside the gold border line "Carvino Registered Trade Mark Nos. 305293 and 306121."

On July 12, 1910, the plaintiffs brought a passing-off action against the defendants, alleging that the defendants' get-up was calculated to lead and must lead the public to believe that their preparation Carvino was the plaintiffs' Wincarnis under a "new name" and that the defendants' get-up was adopted for the purpose of deception. They claimed an injunction, delivery of labels, wrappers, and documents, and an account of profits.

The defendants denied that their get-up was deceptive or intended to deceive. They alleged that the shape of bottle, the pink wrapper, and the character and position of the labels were all common to the trade in similar preparations, and that they had used similar bottles, wrappers, and labels for some years before the action; that they invented the word "Carvino" and in 1909 adopted it as a "new and distinctive name" for their meat wine; that the get-up and labels of "Carvino" were wholly distinct from those of the plaintiffs, and, except in so far as both comprised bottles and wrappers common to the trade, bore no resemblance thereto.

On November 28, 1910, the plaintiffs brought a motion to rectify the register by removing the defendants' trade mark Carvino therefrom. On December 2, 1910, the motion which

had been served on the registrar was ordered to be set down in the witness list with the action and to be heard with witnesses.

The plaintiffs' grounds of objection to the defendants' mark were shortly as follows:

1. The mark Carvino bore such a resemblance to the plaintiffs' mark Wincarnis as to be calculated to deceive and to cause goods marked therewith to be passed off and sold as the plaintiffs' goods.

2. The use and registration by the defendants of the trade mark Carvino constituted an infringement of the plaintiffs' trade mark.

3. The mark Carvino did not contain or consist of any essential particular within the Trade Marks Act, 1905 (5 Edw. 7, c. 15).

4. The defendants' get-up was calculated to deceive and to represent that Wincarnis and Carvino were the same thing and manufactured by the same manufacturers and the use of the word "Carvino" as a material part of the defendants' get-up, and when used as the same had been and was intended to be used was calculated to deceive.

The action and motion were heard consecutively, the registrar attending on the motion. Judgment was reserved in both. In the result the Court held on the evidence that the plaintiffs had established their right to relief in the passing-off action, but were not entitled to have the defendants' mark Carvino removed from the register. The arguments and judgment on the motion to remove the mark are alone reported.

Buckmaster, K.C., and *Sebastian*, for the plaintiffs. We apply to remove the mark Carvino under s. 35 of the Trade Marks Act, 1905, on the ground that it is "an entry wrongly remaining on the register." We did not appeal from the registrar's decision as the defendants' present get-up was not then adopted, and the mark Carvino might have been used with a get-up completely distinguishing their preparation from ours. All our objections to the mark are, however, open to us on this application: *In re Trade Marks of Kenrick & Jefferson, Ld.* (1)

In the first place we say that quite independently of the get-up

(1) (1910) 28 Rep. Pat. Cas. 45.

C. A. 1911

"CARVINO" TRADE MARK, *In re.*

the word Carvino bears such a resemblance to Wincarnis as to be calculated to deceive. It is really the same word with the order of the syllables changed, and it bears the same meaning, namely, meat wine. It is an infringement of our mark, and it does not contain any essential particular within s. 9.

Secondly, assuming that we succeed in the passing-off action, we are entitled to have the mark Carvino removed from the register on the ground that it has been used as part of a get-up calculated to deceive. The Court must look at the mark as used and not as registered, and if as used it is calculated to deceive it must be removed: *In re Worthington & Co.'s Trade Mark* (1); *In re Christiansen's Trade Mark* (2); *In re Farrow's Trade Mark*. (3) The mark Carvino has been used with white letters on a black ground as part of a get-up practically representing it to be Wincarnis under a "new name." The defendants ought not now to be allowed to retain the mark and merely alter their get-up, as that would in effect give them the benefit of their old fraudulent user: *In re Fuente's Trade Marks*. (4) In other words they ought not to be allowed to keep the benefit they have derived by clothing their goods with the plaintiffs' reputation.

Walter, K.C., and *Kerly*, for the defendants. There is no resemblance whatever between the actual words Carvino and Wincarnis. No doubt to a scholar they both suggest the meaning meat wine. But that is merely a description of the article which the plaintiffs cannot monopolize. They are both invented words, and not technically descriptive, and Carvino as a mere name is no infringement of Wincarnis.

Even if the plaintiffs succeed in the passing-off action they are not entitled to remove our mark. Assuming that the get-up with the triplicate labels and black and white letters on the upper ones was deceptive, the deception was not caused or aided by the actual name Carvino. Lemco or any other name in white letters on a black ground would have been just as bad.

In *In re Worthington & Co.'s Trade Mark* (1), *In re Christiansen's Trade Mark* (2), and *In re Farrow's Trade Mark* (3)

(1) 14 Ch. D. 8.
(2) 3 Rep. Pat. Cas. 54, 63.
(3) [1890] W. N. 113; 7 Rep. Pat. Cas. 260.
(4) [1891] 2 Ch. 166, 171.

confusion was liable to arise from legitimate variations of the trade mark itself.

In *In re Worthington & Co.'s Trade Mark* (1) a triangle enclosing a church was refused registration as a trade mark for ale on the ground that if printed in red it might be confused with Bass & Co.'s red triangle.

In *In re Christiansen's Trade Mark* (2) the respondents' registered mark had blank spaces in the form of lamps, but the blanks were always intended to be used for the insertion of medals and were in fact so used. In this form the mark itself was so like that of the applicants as to be calculated to deceive, and it was removed accordingly. Lindley L.J., however, pointed out that if the respondents had used the mark as registered with the spaces left blank there might have been more difficulty in the case, as although the applicants might have had a good ground for restraining the use of the respondents' boxes, which were so like their own as to be mistaken one for the other, that was not their application. Their application was to strike off the respondents' trade mark.

In *In re Farrow's Trade Mark* (3) the actual trade marks, the bull's head and the charging buffalo, were capable of confusion though fairly used.

The true test is whether the trade mark if fairly used would in itself be calculated to deceive. It is impossible to predicate this of the name Carvino. The fact that we have used it with the triplicate label get-up does not render it a bad trade mark, even if that get-up is deceptive.

In *In re Fuente's Trade Marks* (4) it was held that the former fraudulent use of certain labels representing that certain cigars were made in Havannah, though really made in Mexico, disentitled the applicants to have those labels registered as new marks, even though the dishonest part of the labels was omitted. In that case the fraudulent representation had been part of the very labels proposed to be registered. There is nothing of the sort in the present case. However fraudulent the get-up is alleged

(1) 14 Ch. D. 8.
(2) 3 Rep. Pat. Cas. 54, 63.
(3) [1890] W. N. 113; 7 Rep. Pat. Cas. 260.
(4) [1891] 2 Ch. 166, 171.

C. A. 1911

"CARVINO" TRADE MARK, *In re.*

to have been, the trade mark Carvino has always been used intact.

Sargant, for the registrar. Although Carvino and Wincarnis both mean meat wine and are presumably derived from caro and vinum, that would not justify the registrar in refusing to register Carvino. He has to consider more than the meaning and derivation. He has to consider whether the word itself, as it will probably be used, is calculated to deceive. Now no reasonable person could possibly identify the words themselves, and the registration of Carvino was therefore properly allowed. In *In re Aktiebolaget B. A. F. Hjorth & Co.'s Trade Mark "Primus"* (1) the registrar was directed to proceed with an application to register the word "primus" although the word "first" could not have been registered. Registration is of course no defence to a passing-off action (see s. 45).

Buckmaster, K.C., in reply.

Cur. adv. vult.

July 11. SWINFEN EADY J., after stating the evidence in the passing-off action and pointing out that owing to the whole get-up coupled with the label "New name" considerable care was necessary to prevent the defendants' goods being mistaken for those of the plaintiffs, whereas the goods of other manufacturers were readily distinguishable, and also pointing out that that feature of the plaintiffs' and defendants' get-up which consisted of the triplicate arrangement of labels in the same positions and about the same distance from each other and having the two upper ones oblong in shape and printed black and white was not common to the trade, and was not to be found on any goods except the plaintiffs' until the defendants adopted it, continued: Upon the whole case I have come without hesitation to the conclusion that the defendants' preparation is so put up as to be calculated to deceive and to lead to the belief that it is the plaintiffs' preparation, and I cannot exonerate the defendants from intention to deceive. There must be an injunction as asked, with the further relief claimed in the

(1) [1910] 2 Ch. 64.

C. A.
1911
"CARVINO" TRADE MARK, *In re.*
Swinfen Eady J.

statement of claim, and the defendants must pay the costs of the action. [His Lordship continued:]

There is also a motion by the plaintiffs asking that the register of trade marks may be rectified by removing therefrom the word "Carvino." This word was allowed to be registered by the registrar notwithstanding the opposition of the plaintiffs, and there was not any appeal against the decision of the registrar. It is now sought to rectify the register on the ground that when the word was passed by the registrar it was not known that the defendants would use it in connection with the get-up which they afterwards adopted, and it is claimed that a trade mark used dishonestly may be removed from the register. In support of this proposition reference was made to *In re Christiansen's Trade Mark* (1), where it was held that the trade mark must be looked at as used, and not simply as registered, and that as used it was calculated to deceive and must be expunged from the register. But in that case it was the registered mark itself—and independent of get-up—which was being used in a manner calculated to deceive. The mark as registered had spaces in the form of lamps left blank, but these spaces were intended to be used for the insertion therein of representations of medals, and were in fact so used, and as thus used in the manner intended when registered the mark was calculated to deceive. Lindley L.J. pointed out that if the respondents in that case had used the mark simply as registered, that is to say, with the blanks never filled up at all, there might have been more difficulty in the case, and the remedy would have been to restrain the use of the boxes which were so like the applicants' boxes as to be calculated to deceive, and not to strike off the mark. It had been decided previously in *In re Worthington & Co.'s Trade Mark* (2) that in interpreting the Trade Marks Act the Court was bound to look not only at the marks as printed in the *Trade Marks Journal* advertising the application, but at the marks as they would probably be used in the course of trade. But upon the present evidence I cannot come to the conclusion that the trade mark "Carvino" alone is calculated to deceive, without reference to get-up. The defendants may, by changing their

(1) 3 Rep. Pat. Cas. 54, 63. (2) 14 Ch. D. 8.

C. A. 1911

"CARVINO" TRADE MARK, *In re.*

Swinfen Eady J.

bottles, wrappers, and labels, so totally alter the appearance of their goods that no reasonable person would be deceived by the mere use of the trade mark "Carvino." True it is that in the past the word "Carvino" has assisted deception, and there is ground for saying that in substance this is the plaintiffs' word "Wincarnis" with the syllables reversed, but it is the use of the word in connection with the get-up and the prominent label "New name" which has brought about the deception. It is not established to my satisfaction that, independent of get-up, the mark is calculated to deceive, although the case is very near the line.

If the defendants are really desirous of avoiding all imitation of the plaintiffs' goods and not rendering themselves liable to further litigation, they would be well advised in adopting a different get-up, to take as their trade mark some word quite unlike the plaintiffs' word instead of a word so near the line, and especially after their attempt to register the word "Lemcarnis." But this is for them. I refuse the motion, but under the circumstances without costs, except that the plaintiffs must pay the costs of the registrar.

Walter, K.C. As the injunction in the passing-off action involves an entire alteration of our get-up, I ask for a stay pending an appeal.

SWINFEN EADY J. I cannot grant a stay.

Walter, K.C. I also ask for a stay of the account of profits.

SWINFEN EADY J. It is not the practice of the Court to stay such an account, unless irreparable injury would otherwise be caused: *Nerot* v. *Burnand* (1); *Hyam* v. *Terry*. (2) The plaintiffs will proceed with the account at their own risk as to costs. It would unduly protract litigation if an account could not be proceeded with until after the decision of the ultimate appeal in the case.

G. R. A.

C. A.

The defendants appealed against the decision in the passing-off action; and the plaintiffs appealed against the refusal to rectify

(1) 2 Russ. 56. (2) 29 W. R. 32.

the register. The appeals came on together, the defendants' appeal being heard on November 10, 13, and 14, 1911.

C. A. 1911 "CARVINO" TRADE MARK, *In re.*

Walter, K.C., and *Kerly*, for the appellants.
Buckmaster, K.C., and *Sebastian*, for the respondents.
Sargant, for the registrar.

The COURT (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.) allowed the appeal. They held that there was an entire absence on the part of the defendants of any intention to deceive, and in the absence of any evidence of actual deception it was impossible for the Court to draw the judicial inference that the two get-ups were so alike as to be calculated to deceive.

The plaintiffs' cross-appeal was dismissed with costs.

Solicitors : *Blair & W. B. Girling ; J. Westcott & Sons ; Solicitor to Board of Trade.*

G. A. S.

In re WILLOUGHBY. WILLOUGHBY *v.* DECIES.

[1910 W. 1841.]

C. A. 1911 PARKER J. *March* 28, 29. C. A. *May* 24, 25 ; *June* 2.

Will—Advancement—Hotchpot—Interest on Advances—Division of Residue so as to secure Equality of Portions.

A testator by his will, made shortly after his second marriage, gave certain pecuniary legacies upon trusts for the benefit of four of his daughters by his first marriage and gave the residue of his estate, subject to a provision for his widow, upon trust for his said four daughters and the children, if any, of his second marriage in such shares as should equalize the portion of each child, including such child's share under the testator's marriage settlements, the legacies above mentioned, and the share in the residue, provided that in making such division of the residue the funds comprised in his second marriage settlement should be deemed to be divisible among the children of his second marriage immediately on his death notwithstanding the antecedent life interest of their mother therein. The testator by a codicil, made when he had three children living of the second marriage, after slightly altering the legacies given by the will and increasing the provision for the widow, directed that in the division of the residue certain preferential

C. A.
1911
WILLOUGHBY, *In re.*
WILLOUGHBY *v.* DECIES.

payments should be made to the children of the second marriage. The testator died in the lifetime of his second wife:—

Held by Parker J. and the Court of Appeal (Buckley L.J. dissenting), that the direction to secure equality of portions was a direction affecting capital only and did not involve a direction to charge any of the advanced children with notional interest, and that on the death of the widow the capital sums advanced to the respective children (including the preferential payments out of residue) ought to be brought into hotchpot without any interest thereon in the meantime.

At the date of his will, below referred to, namely, January 3, 1856, the testator, Sir John Pollard Willoughby, had been twice married. By his first marriage, which was with Elizabeth Kennedy in 1822, he had eight daughters, namely, Maria Martha, the wife of Jonathan Duncan Inverarity, Caroline Willoughby, Eliza Emma Willoughby, Ellen Augusta Willoughby, Cicely Barr Willoughby, Mary, the wife of A. Malet, Agnes Isabel Norris Willoughby, and Fanny Willoughby. Of these children Caroline Willoughby and Fanny Willoughby had died in their infancy, and Mary Malet had died in 1853, leaving issue.

There was a settlement on the occasion of the testator's first marriage, and under that settlement the children of the first marriage would be entitled to certain funds on his death, he being entitled to the income for life.

The testator's first wife died in 1852, and in 1854 he married Maria Hawkes. On the occasion of this second marriage there was another settlement under which the children of the second marriage would be entitled to certain funds on the death of the survivor of the testator and his second wife.

At the date of the will there was no child of the second marriage.

There had been a settlement on the marriage of Maria Martha Inverarity in 1844, though the testator had not settled any part of the property.

By his will the testator directed payment of his debts and funeral and testamentary expenses, and gave pecuniary legacies to various members of his family and certain friends and charities. He then gave the share, if any, to which in succession to his two deceased children, Caroline and Fanny,

he was entitled in the funds of his first marriage settlement, and any share therein to which by the death of any of his children he might thereafter become entitled, equally between the children and other issue (such issue taking their parents' share only) who might become entitled to the residue of the funds thereby settled.

The will then proceeded as follows: "I give the sum of 5000*l.* to the trustees or trustee for the time being of the settlement made on the marriage of my daughter Maria Martha with her husband Jonathan Duncan Inverarity, to be held by such trustees or trustee upon and for the same trusts, intents and purposes, and with and under the same powers, provisoes and limitations as are in and by the same settlement contained and declared of and concerning the monies and property thereby settled; and the receipt of the trustees or trustee of my last mentioned daughter's settlement shall effectually discharge my executors and trustees from all liability to see to the application thereof."

The testator then gave two sums of 2000*l.* each to his executors and trustees upon trusts in favour of Edith E. R. Malet (the daughter of his deceased daughter Mary Malet) and her children, and brother and father.

The will then proceeded as follows: "I give to my executors and trustees 5000*l.*, to be invested in their names, and to be held by them upon the trusts following, that is to say, upon trust to pay the interest and annual income thereof to my daughter Ellen Augusta Willoughby during her coverture, and, in the event of her marriage, then in trust to pay such interest and annual income to my said daughter Ellen Augusta during her life for her separate use, and on her separate receipt, so as to be free from the control of any husband she may marry, but only after the same shall become due and without power on her part to charge or anticipate the same, and, in the event of the marriage of my said daughter Ellen Augusta Willoughby and after her decease, then upon trust as to the capital thereof for the children of my said daughter Ellen Augusta who being a son or sons shall attain twenty-one or being a daughter or daughters shall attain twenty-one or marry, equally between them if more than one or if there shall be only one such child

C. A. 1911 — WILLOUGHBY *In re.* WILLOUGHBY *v.* DECIES.

then wholly to such one child, and, if my daughter Ellen Augusta shall die unmarried or being married there shall be no child entitled to take under the preceding limitation, then as to the capital, In trust for such person or persons and in such manner as my daughter Ellen Augusta shall by deed or will or codicil, revocable or irrevocable, and notwithstanding coverture appoint . . . . I give to my executors and trustees 5000*l.*, to be invested in their names and to be held by them upon the same trusts in favour of my daughter Cicely Barr Willoughby and her children, appointees, and next of kin, as are hereinbefore declared in respect of the 5000*l.* bequeathed in favour of my daughter Ellen Augusta and her children, appointees, and next of kin. I give to my executors and trustees 5000*l.* to be invested in their names and to be held by them upon the same trusts in favour of my daughter Agnes Isabel Norris Willoughby and her children, appointees, and next of kin, as are hereinbefore declared in respect of the 5000*l.* bequeathed in favour of my daughter Ellen Augusta and her children, appointees, and next of kin."

The testator then directed his executors and trustees to set apart and invest funds to provide a life annuity for his daughter Eliza Emma, and that, subject thereto and at her death, such funds should fall into his residuary personal estate. And he gave his residuary real and personal estate to his executors and trustees "in trust to set apart and invest in their names or name a sum of 12,000*l.*, or to set apart a competent portion of my investments for that purpose, and to pay the annual income . . . . to my widow during her widowhood, and, subject to such provision for my widow, then, as to the whole residue, in trust for my children Maria Martha Inverarity, Ellen Augusta Willoughby, Cicely Barr Willoughby, and Agnes Isabel Norris Willoughby, and the child and children (if any) of my present marriage in such shares as shall equalize the portion of each child, including such child's share in the funds comprised in my marriage settlements respectively under such settlements or this will, the legacies of 5000*l.* hereinbefore bequeathed in favour of my four last named daughters, and the share in my residuary estate: provided that in making such division of the residue the

funds comprised in my second marriage settlement shall be deemed and taken as divisible among the children, if any, of my second marriage immediately upon my death notwithstanding the antecedent life interest of their mother therein, and that, as between the children of my second marriage, no child shall share in my residuary estate without bringing into hotchpot and accounting for any share of the settled funds which such child may take under any appointment made under such settlement . . . . Provided also, that my trustees and executors shall, for the purpose of making a division of my residuary estate, without waiting for future contingencies, have full power and discretion of estimating and allowing for any contingent interests which may be comprised within my second marriage settlement. And I declare that the share of every daughter of my second marriage shall be held by my trustees upon the same trusts in favour of such daughter, her children, appointees, and next of kin as are hereinbefore contained respecting the legacy of 5000*l.* bequeathed in favour of my daughter Ellen Augusta, her children, appointees, and next of kin: Provided always, and I hereby declare, that, if and when any child of my present marriage, being a son shall die under twenty-one, or being a daughter shall die under twenty-one and unmarried, the share of every such child, as well original as accruing under this proviso, shall accrue and survive to the survivors or survivor or other or others of such children and my said daughters Maria Martha Inverarity, Ellen Augusta, Cicely Barr and Agnes Isabel Norris equally."

After the date of the will and before the date of the first codicil below referred to Agnes I. N. Willoughby, who had attained twenty-one, died unmarried; Ellen Augusta Willoughby married one Macleod, and Cicely Barr Willoughby married one Storer (on the occasion of each of which two marriages the testator transferred sums of East India Government stock to the trustees of the two daughters' settlements); and five children of the second marriage were born. Of these two died in their infancy and before the testator, and the others were Alice Anna Willoughby, Sir John Christopher Willoughby, and Maria Gertrude, Baroness Decies.

By the first codicil to his will, dated March 17, 1866, after giving certain pecuniary legacies and annuities, the testator made,

C. A. 1911 — WILLOUGHBY, *In re.* WILLOUGHBY *v.* DECIES.

inter alia, the following dispositions: "Instead of the legacies in my will to my three married daughters, the following legacies are to be given to the trustees of their settlements on the trusts thereof, that is to say, Maria Martha Inverarity 100,000 rupees five per cent. paper, Ellen Augusta Macleod 5000*l.* Great Indian Peninsula Railway Stock, and Cicely Barr Storer 5000*l.* five per cent. India Bonds or debentures." The codicil proceeded as follows: "And I declare that, instead of the provision made out of the residue for my widow, my executors shall set apart funds to secure and pay her an annuity of 2000*l.* a year, by equal quarterly payments, during her widowhood, and, in dividing the residue among my children, my two children Alice and Maria Gertrude are to have 12,500*l.* apiece for them and their children, and my son John 10,500*l.*, before any further division is made, and if any specific bequest hereby made shall fail by reason of the specific fund not existing, it is to be made good out of my general estate at par value."

By a second codicil, dated two days later, the testator declared that the annuity provided by the former codicil for his widow was to include the income to which she would be entitled under their marriage settlement, and in other respects he confirmed his will and first codicil.

The testator died on September 15, 1866.

The first marriage settlement funds were divisible amongst, and were transferred to the trustees of the marriage settlements of, Mrs. Inverarity, Mrs. Macleod, Mrs. Storer, and Mrs. Malet.

After funds had been set aside to provide for the widow's annuity, with a margin for depreciation in income, there was not sufficient to pay in full the legacies to the three surviving children of the second marriage, but payments were made to them on account out of capital and surplus income; no other legacies or annuities remained unsatisfied.

The testator's widow died on May 5, 1910. All the children of the first marriage were dead, but all those who had been married left issue.

Under a testamentary appointment made by the widow, and a family arrangement, the funds subject to the second marriage settlement became divisible amongst the three surviving children

of the second marriage subject to a certain interest of Alice Anna Willoughby in the income.

Maria Gertrude, Lady Decies, was a widow and had never had any children.

In these circumstances an originating summons was taken out by Sir J. C. Willoughby and Alice Anna Willoughby, the trustees of the testator's will and codicils, against Maria Gertrude, Lady Decies, Mrs. Leila G. M. D. Fullerton (only child of Mrs. Storer), three persons who were the trustees of Mrs. Inverarity's marriage settlement, and R. W. Macleod (eldest son of Mrs. Macleod), raising the following, among other, questions:—

(*a*) Whether the two sums of 12,500*l.* by the first codicil, respectively given in favour of Alice Anna Willoughby and Maria Gertrude, Baroness Decies, and their children, and the sum of 10,500*l.* thereby given to Sir J. C. Willoughby, carried interest from the date of the testator's death, or from any other and what date, and if so at what rate, and whether the same ought to be brought into hotchpot in the division of the residuary estate;

(*b*) Whether the same two sums of 12,500*l.* were by the first codicil settled on the same trusts as the shares in the residuary estate by the will settled in favour of Alice Anna Willoughby and Maria Gertrude, Baroness Decies, and their respective children, appointees, and next of kin;

(*c*) Whether the share in the residuary estate by the will expressed to be given to Agnes I. N. Willoughby lapsed by reason of her death in the testator's lifetime, or whether his residuary estate became divisible between all his children living at his death;

(*d*) Whether in the division of the residuary estate the share of each child in the testator's marriage settlement funds and the sum settled by him on the marriages of Mrs. Macleod and Mrs. Storer and the sums bequeathed by the first codicil to the trustees of the settlements of the testator's married daughters, or any of such shares or sums, or any other sums, ought to be brought into hotchpot by such children respectively, and, if the shares in the testator's second marriage settlement funds ought to be so brought into hotchpot, how such shares ought to be valued for that purpose.

C. A. 1911

WILLOUGHBY, *In re.*

WILLOUGHBY *v.* DECIES.

The summons was adjourned into Court and heard by Parker J. on March 28 and 29, 1911.

A. L. Ellis, for the plaintiffs, stated the facts and the questions to be argued.

Romer, K.C., and *G. R. Northcote*, for Maria Gertrude, Lady Decies. Interest ought to be charged on any advances made to the children: *In re Lambert.* (1) [They also referred on this point to *In re Hargreaves* (2); *In re Poyser.* (3)]

The gift under which Agnes I. N. Willoughby took a share was a class gift, and therefore her share did not lapse: *In re Jackson* (4); *In re Mervin* (5); *Kingsbury* v. *Walter.* (6)

The intention of the testator that there shall be equality among his children will not be effected unless the children of the second marriage are allowed interest at 4 per cent. on their legacies as from the date of the testator's death.

Martelli, K.C., and *Whitmore Richards*, for the trustees of Mrs. Inverarity's settlement. The shares in the residuary estate are not to be paid until the residue is divisible, that is to say, when all the legacies have been paid; and, therefore, no interest is payable. Interest should not be charged prior to the period of distribution on the advances made by the testator to the children of his first marriage: *In re Dallmeyer.* (7)

Gatey, K.C., and *Frederic Thompson*, for the other defendants.

Romer, K.C., in reply.

PARKER J. Before referring to the terms of the will and codicil which give rise to the questions which I have to determine, it will be as well to state what was the condition of affairs when the testator made his will.

His will was dated January 3, 1856, and at that time he had a wife living but no children by that marriage. But he had been previously married, his first wife having died, and by his first marriage he had had eight daughters, of whom five only were still

(1) [1897] 2 Ch. 169.
(2) (1903) 88 L. T. 100.
(3) [1908] 1 Ch. 828.
(4) (1883) 25 Ch. D. 162.
(5) [1891] 3 Ch. 197.
(6) [1901] A. C. 187.
(7) [1896] 1 Ch. 372.

living. One of those daughters was married and the other four were single. On the occasion of his first marriage there had been a settlement, under which the children of his first marriage would be entitled to certain funds on his death, he being the life tenant. On the occasion of his second marriage there had been a similar settlement, and in that case the children of the second marriage, if any, would become entitled to the settled funds upon the death of the survivor of himself and his present wife. It was under those circumstances that he made his will.

I shall not state in detail all the gifts made by the will, but shall only state generally those portions of it which appear to me to be material. The scheme of the will was, shortly, as follows: It made a special provision for one of the testator's daughters by way of annuity. I need not further refer to that because she appears to have died in the testator's lifetime. For the married daughter he provided a fund of 5000*l.* which he directed to be paid to the trustees of her marriage settlement, there having been a settlement on her marriage, although the testator had not settled any part of the property comprised in it. In respect of each of the three other daughters he provided similarly a fund of 5000*l.* which he directed to be held in trust for the daughter for life, and after her death for her children, and, in default of children taking a vested interest, for her general appointees either by deed or will. Then he comes to the residue of his estate, and he gives it to the trustees upon trust for sale or conversion, and after payment of the legacies and funeral and testamentary expenses and debts to provide a sum of 12,000*l.* which is to be set aside for his second wife. The interest of that sum is to be paid to her during her life, and after her death it is to fall into residue. Then he comes to the beneficial disposition of his residue. He says that it is to be held on trust for his children Maria, Ellen, Cicely, and Agnes—who were four of the children of his first marriage, excluding the one for whom by his will he had made special provision by way of annuity and who died in his lifetime—"and the child and children (if any) of my present marriage in such shares as shall equalize the portion of each child, including such child's share in

C. A. 1911 WILLOUGHBY, *In re.* WILLOUGHBY *v.* DECIES. Parker J.

the funds comprised in my marriage settlements respectively under such settlements or this will, the legacies of 5000*l.* hereinbefore bequeathed in favour of my four last named daughters and the share in my residuary estate: provided that, in making such division of the residue, the funds comprised in my second marriage settlement shall be deemed and taken as divisible among the children, if any, of my second marriage immediately upon my death notwithstanding the antecedent life interest of their mother therein."

Now, pausing there for one moment, it appears to me clear that the division of the estate is primarily considered by the testator to take effect upon his death. He contemplates that there will be enough to provide for the pecuniary legacies and for the wife's fund of 12,000*l.*, and that there will be a distributable residue, and then that residue is to be distributed in order to bring about a certain result, and after that result has been obtained each child ought to be able to say, "I have received from my father, by way of portion, an equal amount with all his other children." Now "portion" is a word to which a definitely known and ascertained meaning has been given by the Courts. It does not include allowances out of income; it does not include ordinary small gifts such as a testator may reasonably be supposed to give to his children; but it does include sums given to the children by way of advancement or settled on their marriages, and other sums which, in the ordinary sense of the word, are considered as having been paid as permanent provision for the child. It appears to me—and the testator evidently thought so too, because he expressly refers to it—that "portions" would include what a child was entitled to under the marriage settlement of its parents. The word would also include legacies such as the 5000*l.* legacies bequeathed by his will, and would also include shares of residue. The word might have included more than that, although this was not the case at the date of the will, for the testator had not then settled sums upon the daughters upon their marriages. It will be observed, in confirmation of what I have said as to the time when the testator contemplated that the division should take effect, that he directs a valuation of the shares of the children of the second marriage, under the

marriage settlement under which they were interested, at the time of his death, irrespective of their mother's interest; but he further goes on to say that this is a provision which only affects the children inter se of that marriage and not the children of the first marriage—no child is to take a share in the residuary estate without bringing into hotchpot and accounting for every share of the settled funds which such child may take under any appointment made under such settlement. The reason of that is fairly clear. The testator's wife, if she survived, would have a power of appointment, and that power might be exercised. The exercise of the power might tend to defeat his intention as to equality of portions, and therefore he puts in the hotchpot clause, which is only applicable as between the children of the second marriage. Now let me consider for a moment, before I come to the codicil, how under that direction the estate ought to be distributed. First of all, of course, the pecuniary legacies will have to be paid, together with the debts and funeral and testamentary expenses, and then the sums of 5000*l.*, and then the sum of 12,000*l.* ought to be set aside for the wife. As soon as that is done there is a distributable estate, and, after making a proper valuation for the purpose of ascertaining what is to be brought into hotchpot, the shares of the children will be capable of being ascertained, and, if in the meantime the divisible fund at his death has been bearing interest, that interest will belong to the children in proportion to their shares in the fund from which it arose. Of course, during the first year from the testator's death a certain amount of income would accrue, and if the realization were postponed beyond the expiration of one year from the testator's death, any further income which might accrue would be divisible in the same way. In that way it appears to me that each child would be able to say, "I have received by way of portion exactly the same amount as all the other children of my father." So far, it appears to me, there is no particular difficulty in giving effect to what is the testator's evident desire.

I will now consider for a moment what happened between the date of the testator's will and the date of his first codicil. Between those dates two of his daughters, who were unmarried at the date of his will, married, and upon the occasion of each

C. A. 1911

WILLOUGHBY, *In re.* WILLOUGHBY *v.* DECIES.

Parker J.

marriage the testator settled certain securities. It appears also that between the date of his will and the date of his first codicil he had by his second wife three children, two daughters and a son.

Under these circumstances the testator slightly modified his will by his first codicil. For the pecuniary legacies which he had given to his daughters he substituted legacies of securities, and, roughly speaking, the result of that is to give the daughters among themselves an approximate equality with regard to what they had received under the marriage settlements and by virtue of the will by way of legacy. Then he declares that "instead of the provision made out of the residue for my widow my executors shall set apart funds to secure and pay her an annuity of 2000*l.* a year by equal quarterly payments during her widowhood." Therefore, instead of the specific fund, to the interest of which she was entitled during her life under the will, a fund is to be set apart to secure an annuity, and that annuity is to be paid to her by quarterly payments during her life or widowhood. Then he says "And in dividing the residue among my children"—which I read as meaning "in giving effect to the will with regard to the distribution of the residue among my children"—"my two children Alice and Maria Gertrude are to have 12,500*l.* apiece for them and their children, and my son John 10,500*l.*, before any further division is made."

In my judgment, what the testator was there considering was that, having regard to the facts that he had advanced his married daughters, and was making other provisions by way of legacies for his other daughters instead of giving them the 5000*l.* legacies, and had made such a large alteration in favour of his wife as to give her an annuity of 2000*l.* a year, there might not be a sufficient immediately divisible estate to give effect to the direction contained in his will; and his idea was that the funds which were to come to the two daughters and the son of the second marriage out of his residuary estate were to be paid in priority to the funds of the other legatees who were otherwise provided for by advances. And the testator does in that sense contemplate that the division of his estate may, at any rate partially, be postponed till the death of his widow and may not take place immediately on his own death.

What actually happened was what the testator, I think, contemplated might happen. After his death the legacies and debts and funeral and testamentary expenses were paid, and a fund was set aside which was sufficient to produce the 2000*l.* a year. In fact the fund set aside was more than sufficient for that purpose, because enough was set aside to secure a margin against a possible variation of the interest of the investments. Then a fund remained, but that fund was entirely insufficient to pay the preferred shares in the residue to the children of the second marriage, and, therefore, could only be distributed among them on account. That was done. The widow lived for very many years after the death of the testator, and during that time her annuity was paid out of the income of the fund which had been set apart, and in each year, having regard to the fact that more had been set apart than was necessary to produce the annuity, a certain amount of income remained which was paid to the persons entitled to the preferred shares of the residue on account of interest.

The widow has now died, and the fund which was set aside is now sufficient to enable the directions given by the will, as modified by the codicil, to be carried completely into effect and to enable all the sums which have been advanced, and which ought, under the construction of the will, to be taken into account in the distribution, to be so taken into account, so that effect may be given to the testator's direction, under which each child was to take, by way of portion, the same sum. But in making the distribution which is now necessary certain questions have arisen for my decision. One question may shortly be stated to be, whether the advanced children are to bring into account anything by way of interest on the sums paid to them by way of advance. Some cases have been cited to me which all turn, in my opinion, upon the true construction of special directions given by the testator in the particular case, but I can find no case which is in any way analogous to the case before me. In the cases I have referred to the direction was either that certain sums were to be taken in satisfaction of a certain share, or that they were to be brought into hotchpot in the distribution of the estate. In no reported case can I find a direction by the testator that the estate

C. A. 1911 — WILLOUGHBY, *In re.* WILLOUGHBY *v.* DECIES. — Parker J.

is to be so distributed that the portion or portions of each child shall be the same. It seems to me that if notional interest is brought in in respect of advances, from whatever date it may be thought that it ought to be brought in, it may and probably will happen that the testator's intention with regard to the equality of portions will be defeated. Take, for instance, the contention, which is put forward on behalf of the children of the second marriage, that interest from the time of the testator's death (which was prima facie the time when the residuary estate became divisible) is to be brought in for the last forty years—during which the estate has not been able to be distributed by reason of the widow's annuity; in that case the share of the advanced children, instead of being 12,000*l.* or thereabouts to be brought in, would amount to some 30,000*l.* or 40,000*l.*, and they would probably be excluded from any share at all in the residuary estate. If they were so excluded no one of those children could say, "I have had the same share by way of portion as the son or two daughters of the second marriage."

It appears to me, therefore, that this question of bringing in notional interest at 4 per cent. ought, for the purposes of this will, to be entirely rejected, and that on that principle it does not matter whether you take the period of distribution to be the death of the testator or the death of his widow, when the fund became available for distribution. In each case what the Court has to do, and what the trustees have to do, in distributing the fund is to distribute it so as to secure equality of portion, and for that purpose you must make the valuations directed by the will. As soon as that is done there is a fund, an income-bearing fund, which is divisible, and it is divisible so as to secure that equality of portion, and the interest on it is divisible in proportion to the shares of the children in the fund itself. In my judgment, that is the only way in which I can give effect in this case to what is the intention of the testator. He did not intend that the equality which he was aiming at should be an equality of benefit, but he did intend that it should be an equality by way of portion. Though it may be that in certain cases which have been cited the proper course was to charge interest because the idea was equality of benefit, yet when the testator himself

contemplates inequality of benefit—which he clearly does in this case, because he has advanced sums in his lifetime and is making different provisions with regard to the legacies in respect of each of his daughters—and directs that there shall be equality of portion, it appears to me that what he is speaking of is merely the capital division of the estate and has nothing to do with interest.

Therefore my decision in this case is, that you have, first of all, to value what is necessary to be valued for the purpose of ascertaining the sums advanced by way of portion, and in the case of the funds settled by the marriage settlements it appears to me that valuation will have to be made as at the date of settlement. In the case of specific legacies given by the codicil in substitution for pecuniary legacies it appears to me that they should take place at the date of the death. In the case of the funds given in favour of the younger children there is nothing to disturb the direction in the will as to its taking place at the date of the death, and therefore they will be valued in the way directed by the will too. When those funds have been ascertained there will be a distribution so as to secure equality after these funds have been brought into account with regard to capital. As regards any income available it appears to me that it has to be divided among the parties in accordance with their interests in the capital, and for that purpose I think the payments made to the children who are entitled to preferred shares in residue were properly made, because, as a matter of fact, the interest paid to them arose from the fund which, by virtue of that preference, they were really entitled to. With regard to the income accrued on the whole fund since the death of the widow, it will be distributed in the same way, giving effect to the same priority until it is paid.

One or two other questions arise. In the first place, a question arises as to whether the shares of the daughters of the second marriage are or are not settled. With regard to that, it appears to me that the reference in the codicil to the daughters having the share "for them and their children" really refers in a compendious way to the settlement which the testator has made of their shares by the will, a settlement which gives them

C. A. 1911

WILLOUGHBY, *In re.* WILLOUGHBY *v.* DECIES.

Parker J.

the life interest with remainder to their children and in default of children gives them a general power of appointment; and with regard to that I cannot treat the words of the codicil as introducing a fresh settlement and displacing the settlement which is directed by the will.

Then there is another question, as to whether the share of one of the daughters, who appears to have died a spinster in the lifetime of the testator, lapses, or whether, by virtue of the gift being a gift to a class, the deceased daughter simply drops out and her share accrues for the benefit of the other members of the class. In my judgment, (and it is not really disputed by anybody) the residuary gift in the will is a class gift. Therefore the share of the deceased daughter accrues for the benefit of the other members of the class, and does not lapse so as to cause an intestacy.

F. E.

Lady Decies appealed from this judgment upon the question of interest. The appeal was heard on May 24 and 25, 1911.

Romer, K.C., and *G. R. Northcote*, for the appellant. For all purposes interest on advances ought to run from the date of the death, because that was in this case the date of distribution : *In re Rees* (1); *In re Dallmeyer* (2); *In re Lambert* (3); *In re Whiteford.* (4) All those authorities shew that the period for commencing interest is the period of distribution, but it must be ascertained from the will and the circumstances whether the period of distribution is the testator's death or that of a tenant for life. *In re Hargreaves* (5) is decided on the same principle, but the interest charged was in effect set off against income which ought to have been received.

Martelli, K.C., and *Whitmore Richards*, for the trustees of Mrs. Inverarity's marriage settlement. *In re Dallmeyer* (6) shews that there is no such general rule as suggested by the appellant, and that the question in each case depends upon the language used by the testator. Here the language is peculiar; it is not

(1) (1881) 17 Ch. D. 701.
(2) [1896] 1 Ch. 372.
(3) [1897] 2 Ch. 169.
(4) [1903] 1 Ch. 889.
(5) (1902) 86 L. T. 43; (1903) 88 L. T. 100.
(6) [1896] 1 Ch. 389.

like the language used in *In re Rees* (1), which was a common form clause. The testator here did not mean anything more than that there should be equality in the capital of the residue when it came to be distributed. Here there could be no real division until the death of the widow having regard to the state of the assets, and in such circumstances that is the period of distribution: *In re Lambert* (2), per Stirling J. *In re Whiteford* (3) is not an authority for the proposition that, whatever the language of the will, interest is to be charged from th date of the testator's death.

Gatey, K.C., and *Frederic Thompson*, for Mrs. Storer and R. W. Macleod.

G. R. Northcote in reply.

Cur. adv. vult.

June 2. COZENS-HARDY M.R. At the close of the argument in this case my view was in favour of the appellant. But after further reflection I have come to the conclusion that Parker J.'s decision is correct.

The will and codicil of the testator are peculiar documents, not in accordance with any known common forms. There are no general principles applicable to this case. The Courts have laid down certain rules for working out the consequences of a common hotchpot clause. It is sufficient to state (1.) that no interest is charged against an advanced child prior to the testator's death; (2.) that where the period of distribution of the testator's property is at the testator's death, interest is charged against an advanced child from the death and not from the subsequent date at which in fact the distribution takes place; (3.) that if the period of distribution is at the expiration of a period of accumulation or of a prior life estate, interest is charged not from the death but from the period of distribution; and (4.) that the effect of a charge upon the residue, such as a life annuity secured by a fund set apart to meet it, does not alter the period of distribution. There will not be two periods of distribution, one for what I may call the free residue, and the other for the annuity fund on the death of the annuitant.

(1) 17 Ch. D. 701. (2) [1897] 2 Ch. 169, 178.
(3) [1903] 1 Ch. 889.

C. A. 1911 — WILLOUGHBY, *In re.* WILLOUGHBY *v.* DECIES. — Cozens-Hardy M.R.

My difficulty is in seeing what bearing these rules have upon the present case, where the testator gives special and peculiar directions as to the division of his estate. [His Lordship then stated the facts and referred to the will and codicil. In the result he agreed with Parker J. that the direction in the will to divide the residue in such shares as should equalize the portion of each child was a direction affecting capital only and did not involve a direction to charge any of the advanced children with notional interest.]

BUCKLEY L.J. In this judgment I shall use the words "period of distribution" as they are commonly used in the books as expressive of the point of time at which under the trusts of the will the fund is distributable, and the words "date of distribution" as expressive of the point of time at which distribution is in fact made. If the gifts in the will are immediate the period of distribution is the testator's death. If he creates a tenancy for life and the gifts are reversionary upon that interest, then the period of distribution is the death of the tenant for life. The decision of Sir George Jessel M.R. in *In re Rees* (1) involves two propositions, first, that in giving effect to a hotchpot clause interest is not to be calculated upon advances made in the testator's lifetime over the period ending with his death, and, secondly, that interest is to be calculated upon advances as from the period of distribution. The first proposition may be said to rest upon this, that equality under the hotchpot clause is to be equality in respect of the testator's estate, meaning by that expression that of which he dies possessed; that the benefit accruing during the testator's lifetime in respect of an advance made in his lifetime is a benefit enjoyed, it is true, at the expense of the living testator's pocket, but not at the expense of the dead testator's estate. The second proposition rests not upon the fact that a testator has said a word about interest upon advances, for, as Sir George Jessel said, he perhaps has not, but upon a principle adopted by the Court that equality is achieved by calculating interest. In *In re Rees* (1) there was a life estate in the widow. The period of distribution

(1) 17 Ch. D. 701.

was her death, and interest upon the above principle had to be calculated from the period of distribution, that is her death, to the date of distribution, that is payment.

A testator may name any period of distribution that he likes. If he directs accumulation for a certain time after his death and then directs distribution the period of distribution is the expiration of the period for accumulation. That was the case in *In re Dallmeyer*. (1) The testator's estate for division is in that state of circumstances not that which he possessed at his death, but the larger sum produced by that which he so possessed and its subsequent accumulation. The decision in *In re Dallmeyer* (1) was in substance that in that state of facts the period over which interest is not to be charged goes beyond the date of the testator's death and extends down to the date at which accumulation is to cease, notwithstanding that the testator has not created any intervening particular estate. The dates were that the testator died in 1883, that a son was advanced in 1884, and that the period of distribution arrived in 1894. The decision was that the son was not to be charged with interest from 1884 to 1894. During that ten years he enjoyed a benefit just as the son advanced in his father's lifetime receives a benefit. He received it with the result of reducing the amount of the accumulated estate just as a son advanced in his father's lifetime receives a benefit with the result presumably of reducing that which his father will own at his death. But in neither case does he receive it at the expense of the estate in respect of which equality is to be achieved. *In re Dallmeyer* (1) contained nothing new. It was but a development of the same principle as *In re Rees*. (2)

A testator may name such period of distribution as he chooses, and he may, I conceive, if he pleases, name more than one in respect of different funds. But it does not follow from the fact that he has given an annuity and, subject to the annuity, has given his property for equal division that there result two periods of distribution, namely, his death as regards the sum not wanted for the annuity, and the death of the annuitant as to the sum wanted for that purpose. In such case there is but one period of

(1) [1896] 1 Ch. 372. (2) 17 Ch. D. 701.

C. A. 1911

WILLOUGHBY, *In re.* WILLOUGHBY *v.* DECIES.

Buckley L.J.

distribution, namely, the testator's death, and the incidence of the annuity must be borne consistently with the above principles.

In *In re Lambert* (1) Stirling J. intimated by way of dictum that if the amount of the annuity were such as that there was nothing immediately available for division during the annuitant's lifetime he would have been prepared to hold that the period of distribution was not until the death of the annuitant. I doubt that proposition. But, as will presently appear, the facts of this case do not raise it. The only other decision which I need mention is *In re Hargreaves* (2), and I do so only for the purpose of saying that to my mind it involves no principle different from that involved in the cases already mentioned. It was only a particular application of the same principle in a form more applicable to the facts of that particular case.

These being the authorities it remains to apply them to this will.

The reasoning upon which the authorities rest may, I think, be stated as follows: Hotchpot implies equality. The equality contemplated is equality at the period of distribution. Although the testator has said nothing about interest upon advances, equality is to be achieved by charging interest from the period of distribution to the date of distribution. All the relevant features in the cases as to hotchpot clauses are, I think, present in this case with the additional feature that this testator has used the word "equalize." The equalization is to be of the portions of the children. Similarly in the hotchpot cases the equalization is to be of the shares of or provision made for the children. In *In re Rees* (3) and *In re Dallmeyer* (4) the word was "share." In *In re Lambert* (1) the words were "provision intended to be hereby made." In *In re Hargreaves* (2) the words were "original share." In the present case the words are "portion," "share," and "hotchpot." If there were nothing further I should be of opinion that it results upon authority that in the present case interest is to be charged. But, as will presently appear, there is more, namely, in the proviso as to the funds in the second marriage settlement.

(1) [1897] 2 Ch. 169.
(2) 86 L. T. 43; 88 L. T. 100.
(3) 17 Ch. D. 701.
(4) [1896] 1 Ch. 372.

The testator gave his residue in trust to set apart 12,000*l.* for his widow for life, and, subject to that provision, then as to the whole residue in trust for certain children in such shares as shall equalize the portion of each child. He then goes on to name, as included within that expression "portion," the child's share in funds coming from several sources from which the child would or might receive benefit, some of which would be in possession at his death and some of which would be or might be in reversion. The interest of the children of the second marriage under the second settlement might be in reversion expectant upon their mother's death. All that the testator had to give was, of course, his residuary estate, but his direction is that that residuary estate shall be so divided in shares as to equalize the portion of each child, having regard to the fact that the children respectively will or may receive other sums from other sources. He goes on to say that the funds in his second marriage settlement (being funds in which some children will share, and as to which he has said that that share is included in that which he has called the "portion") shall be taken as divisible amongst the children of his second marriage immediately upon his death notwithstanding that they may be reversionary by reason of the subsistency of a tenancy for life. If by the word "portion" he meant capital only it would be immaterial whether this capital sum was to be taken to be payable at one date or another date. If interest is to be charged the provision becomes intelligible. By his codicil he declares that instead of the provision made out of the residue for his widow his executor shall set apart funds to secure her an annuity of 2000*l.* during widowhood and goes on to say that in dividing the residue amongst his children certain three children shall have certain sums before any further division is made. At the time of his death there was enough to provide for the 2000*l.* a year and to leave certain sums towards payment of the amounts thus given to these three named children. There was thus residue, in my judgment, distributable at his death. The sums received by these three children were not additional to but in part discharge of their shares in his residue, and none the less because they were entitled to preferential payment. It is for this reason that I say that the point suggested by Stirling J. in

C. A. 1911 — WILLOUGHBY, *In re.* WILLOUGHBY *v.* DECIES. — Buckley L.J.

In re Lambert (1) does not arise. The period of distribution under this will is in my judgment the testator's death. The widow survived the testator by more than forty years, and the respondents have in fact been driven to argue in substance that under this will there are two periods of distribution, first, the testator's death as regards that which was available for division then, and, secondly, the death of the widow as regards the sums which have been set apart to provide her annuity. There is no authority for such a proposition and it is, I think, unsound. The period of distribution then being the testator's death, the date of distribution is forty and more years after his death. It results, in my judgment, that those who after the period of distribution and in anticipation of the date of distribution of the whole fund received payments are to be charged upon the principle of *In re Rees* (2) and *In re Dallmeyer* (3) with interest upon those sums. It results that in my judgment this appeal succeeds.

KENNEDY L.J. By his order which is under appeal, Parker J. declared that certain capital shares, stocks, or funds constituting advances to certain of his children were, in the division of the testator's residuary estate, on the death of his widow as against the surviving issue of the testator's first marriage, to be brought into hotchpot without interest in the meantime. The present appeal asks the Court to substitute for this declaration an order that these capital sums should be brought into hotchpot against these children of the testator with interest thereon at the rate of 4 per cent. per annum as from the date of the testator's death or from the dates of the actual payment if subsequent to his death.

In my opinion the declaration of Parker J. in this matter was perfectly right. I agree with him that upon the true construction of the express terms of the will and first codicil it is equality of portion and not equality of benefit which the testator has stated to be his purpose. And, further, the pecuniary dispositions shew, I think, in themselves that the idea of equality of benefit was not present to his mind. I do not understand it to be questioned

(1) [1897] 2 Ch. 169. (2) 17 Ch. D. 701.
(3) 1896] 1 Ch. 372.

that, in regard to testamentary dispositions, "portion" is ordinarily interpreted as meaning the capital sum coming to the beneficiary from the bounty of the testator. In fact the actual distribution could not, in the circumstances of this case, completely, or, indeed, except to a limited extent, take place until the death of the testator's widow; but, if the intention of the testator to create equality of portion and not equality of benefit is kept in view, it does not really matter, as Parker J. points out, in regard to this particular question, whether you regard the date of the testator's death or the date of the widow's death as the period of distribution. The idea of notional interest at 4 per cent. on advances for which the appellant contends must in either view be rejected. If it were carried out, as the appellant contends, for the forty years during which the testator's widow survived him, the "equality of portion" in regard to the children of the first marriage would, as it seems to me, be rendered impossible.

As Lord Herschell observed in the course of his judgment in *In re Dallmeyer* (1), the matter in controversy must be determined by a study of the language used by the testator; and it appears to me that to disregard the ordinary meaning of the word "portion" and to treat the "equality of portion" prescribed by the testator in a very clear and intelligible scheme of testamentary disposition as if it were "equality of benefit" and so bring in the notional interest at 4 per cent., which will certainly not result in an equality of portion, is not to determine this case by a study of the testator's language.

Reference was made very fully by the appellant's counsel to certain decided cases: *In re Rees* (2); *In re Dallmeyer* (1); *In re Lambert* (3); *In re Hargreaves.* (4) I do not think that the consideration of those cases is really of any assistance to us here. If I were asked whether any principle or rule can be deduced from them, it would be that where you find in a will a direction for the distribution of residue, so as to equalize benefit between advanced and unadvanced beneficiaries, you must look for the intended period of distribution and charge interest on the

(1) [1896] 1 Ch. 372, 385.
(2) 17 Ch. D. 701.
(3) [1897] 2 Ch. 169.
(4) 86 L. T. 43; 88 L. T. 100.

C. A. 1911 — WILLOUGHBY, *In re.* — WILLOUGHBY *v.* DECIES. — Kennedy L.J.

advances only from that date, which may be the death of the testator, or may be a later date. This is of no use to us here. The language to be construed differed materially in each case, both from the language in all the other of those cases and from the language of the present will. In none of them did the salient provision of the present will as to "equality of portions" form part of the will. Each case was necessarily decided on the special language of the particular will.

It is true, no doubt, as Mr. Romer pointed out in argument, that Sir George Jessel M.R. in *In re Rees* (1) (the earliest of this group of cases) did not rely upon any particular provision in the will before him, the provisions of which consisted, substantially, in an ordinary gift of residue upon trust for the testator's wife for life with remainder to his children equally, with a proviso, for their bringing into hotchpot sums which he had advanced to them in his lifetime. The Master of the Rolls decided that in distributing the residuary estate amongst the children the advanced children must bring their advances into hotchpot with interest at 4 per cent. from the death of the widow to the distribution of the estate. The judgment of Parker J. appears to me not to conflict with that decision, which was, as Lord Herschell pointed out in *In re Dallmeyer* (2), a decision which must be read in connection with the point which the Master of the Rolls was there considering, namely, whether the interest should be charged from the death of the testator or, according to the terms of that particular will, from the death of his widow. In *In re Lambert* (3), upon a different will and different circumstances Stirling J. came to a conclusion which appears to me neither to add to nor to vary the law presented in the earlier case.

I do not think that the judgment of Parker J. in this case conflicts with any of those decisions, or that ingenuity can extract from them any principle of construction which helps us in construing the present will. Going to the special provisions of this will, and to that which appears to me to be the natural and necessary meaning, if fairly construed, I think that the

(1) 17 Ch. D. 701. (2) [1896] 1 Ch. 372, 385.
(3) [1897] 2 Ch. 169.

judgment of Parker J., which I wish to adopt in its entirety, was right, and that this appeal should be dismissed.

C. A. 1911 WILLOUGHBY, *In re*. WILLOUGHBY *v.* DECIES.

Solicitors: *Dawson, Bennett & Co.; Currey & Co.; George Reader & Co.*

H. B. H.

TAYLOR, PLINSTON BROTHERS & CO., LIMITED *v.* PLINSTON.

C. A. 1911 *October* 21.

[1911 T. 967.]

Practice — Committal — Attachment — Motion to commit — Service of Copy of Affidavit—Rules of the Supreme Court, 1883, *Order* LII., *r.* 4.

By Order LII., r. 4, "Every notice of motion . . . . for attachment . . . . shall state in general terms the grounds of the application; and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion":—

Held, that the rule did not apply to a motion to commit, and consequently that upon a motion to commit a copy of the affidavit upon which the motion was founded need not be served with the notice of motion.

Litchfield v. *Jones* (1883) 25 Ch. D. 64, discussed.

APPEAL from a decision of Warrington J. (1)

By an order dated July 14, 1911, an interim injunction extending over Friday, July 21, was granted restraining the defendant from interfering with or making use of an amusement, machine, or device called "The Cake Walk" belonging to the plaintiff company and then on the foreshore at Southport in the county of Lancaster.

The plaintiff company alleged that the defendant had committed a breach of this injunction and moved for an order that a writ of attachment might issue against the defendant for breach by him of the order, or, in the alternative, that the defendant might be committed for contempt of Court in disobeying the order.

The notice of motion was served on the defendant, but no copy of affidavit on which the motion was founded was served with it.

(1) Ante, p. 368.

C. A. 1911

TAYLOR, PLINSTON BROTHERS & CO., LIMITED v. PLINSTON.

At the hearing the plaintiff company abandoned their application for leave to issue a writ of attachment.

The defendant took the objection that the motion was irregular by reason of the omission to serve the defendant with a copy of the affidavit.

Warrington J. held that Order LII., r. 4, applied as well to motions to commit as to motions for leave to issue a writ of attachment. He accordingly upheld the preliminary objection and dismissed the motion.

The plaintiff company appealed.

J. G. Wood, for the appellants. It is said that Order LII., r. 4, which in terms applies only to motions for attachment, applies also to motions to commit, and the law is so stated in the Annual Practice, 1912, on the authority of *Litchfield* v. *Jones*. (1) That, however, was not a motion to commit, but was a motion for attachment, and the point there decided was that the rule applied to a motion for attachment for disobedience to an order for discovery as well as to a motion for attachment under the old common law practice. In the head-note of the report in the *Law Reports* it is wrongly described as a motion to commit, but in the report in the *Weekly Reporter* it is accurately referred to as a motion for attachment. Committal was not the appropriate remedy in that case. *Litchfield* v. *Jones* (1) is therefore not an authority for the proposition stated in the Annual Practice, and Warrington J. so held. Formerly a writ of attachment was issued without the intervention of the Court at all, but a new practice was introduced by the Judicature Acts, and Order XLIV., r. 2, provided that no writ of attachment shall be issued without the leave of the Court. No such leave, however, is required in the case of a motion to commit. Side by side with that new practice came Order LII., r. 4, which in the case of a motion for attachment requires that a copy of the affidavit upon which the motion is founded shall be served with the notice of motion. The affidavit corresponds to the old præcipe. But the Rules did not contemplate any alteration of procedure as regards committals, and it is not a fair construction

(1) 25 Ch. D. 64 ; 32 W. R. 288.

of Order LII., r. 4, to say that it applies to any mode of taking a person into custody. There is a well-recognized distinction between attachment and committal. Attachment is the proper remedy for neglect of an order to do a particular act; committal for disobedience to an order to abstain from doing an act. This is not a purely technical matter, because the service of the affidavit involves a certain loss of time, and there is not the same imperative need for promptness in the case of attachment, where a man is merely neglecting to do some act ordered by the Court, as there is in the case of committal, where he is doing a prohibited act. In *Harvey* v. *Harvey* (1) no question was raised between committal and attachment and the dicta of Chitty J. were not addressed to the point now at issue. The distinction between the two remedies is exhaustively dealt with by Mr. Registrar Lavie in a memorandum set out in a note to *In re Evans*. (2)

Rolt, for the respondent. The view of the profession is as stated by Warrington J., that service of a copy of the affidavit is necessary in the case of a motion to commit, and this view is supported by the text-writers: Annual Practice, 1912, p. 865; Oswald on Contempt, 3rd ed. p. 205; Daniell's Chancery Practice, 7th ed. vol. i. p. 719; Daniell's Chancery Forms, 5th ed. p. 440, n. In *Hall & Co.* v. *Trigg* (3) and *Carter* v. *Roberts* (4), which are referred to in Mr. Oswald's book, it was assumed that upon a motion to commit service of the affidavit on which the motion was founded was necessary, but apart from *Litchfield* v. *Jones* (5) there is no decision on the point. No reason can be suggested why any distinction should be made as regards procedure between attachment and committal. Order LII., r. 4, applies to every motion under which a man can be taken into custody. If the appellants' view is correct the notice of motion need not even state the grounds of the application.

COZENS-HARDY M.R. This appeal raises a point of practice of general importance. The question, put shortly, is this: Does

(1) (1884) 26 Ch. D. 644.
(2) [1893] 1 Ch. 252, 259.
(3) [1897] 2 Ch. 219.
(4) [1903] 2 Ch. 312.
(5) 25 Ch. D. 64; 32 W. R. 288.

C. A. 1911

TAYLOR, PLINSTON BROTHERS & CO., LIMITED v. PLINSTON.

Cozens-Hardy M.R.

Order LII., r. 4, apply to a notice of motion for committal, or is it only applicable where the motion is for attachment, which I take to mean liberty to issue a writ of attachment?

Now, on the construction of the rule, I fail to see any difficulty. The distinction between attachment and committal is recognized in the Rules of the Court. It is not an old-fashioned distinction. It is quite clear there are certain things which can only be enforced by attachment, and others by committal. I may refer simply to Order XLII., r. 7, which says: "A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal." The Rules therefore contemplate two distinct things—writ of attachment and committal. Why, then, are we to say that the words "notice of motion for attachment" in Order LII., r. 4, extend to a committal? I have not heard any reason suggested. But it is said that the point was decided by North J. in the case of *Litchfield* v. *Jones*. (1) Now *Litchfield* v. *Jones* (1), when you come to look at it, is a clear case. It was treated by counsel on both sides as a motion for attachment. The only question which was really argued by counsel was whether the rule was limited to a particular class of attachment, or whether it applied generally to every class of attachment. North J. held that it applied to all cases where attachment was sought for, and not to particular classes. But in the head-note of the report in the *Law Reports* the motion is described as a motion for committal. If you look at the report in the *Weekly Reporter*, which is a fuller report, it is accurately stated as a motion for attachment; and any other view makes not merely the arguments of counsel on either side of no effect, but also makes the judgment of North J. meaningless and irrelevant.

Now, beyond that authority, there is no judicial authority in the books for the view taken by Warrington J. I am told with perfect accuracy by Mr. Rolt that text-writers have adopted that view, and have adopted the head-note in the case of *Litchfield* v. *Jones* (1) as reported in the authorized reports. That mistake has coloured the view of the text-writers and has

(1) 25 Ch. D. 64; 32 W. R. 288.

led them to put an interpretation upon r. 4 of Order LII. for which there is no judicial authority. It seems to me to be contrary to the plain meaning of the rule, and inconsistent with the general policy of the Rules. It is quite easy, I think, to understand why this notice of motion for attachment was thus dealt with, because, under the old law, a writ of attachment could be obtained by a plaintiff without any evidence at all; he simply took the præcipe into the office and got it without more. That was an abuse. Accordingly the rule said, You shall not even get an attachment unless you serve notice of motion with these other formalities. Why the other matters mentioned in the rule, namely, motions made to set aside, remit, or enforce an award and motions to strike off the rolls, were treated specially, I do not know, but I do feel confident that it was not intended by the Rules to treat "attachment" and "committal" as identical. They were and are distinct remedies, and the procedure provided with reference to attachment is not the procedure provided with reference to committal.

I think, therefore, with great respect to Warrington J., that according to the true construction of r. 4 of Order LII., it has no application to a committal; and that this appeal ought to be allowed.

FARWELL L.J. I entirely agree. To my mind it is plain that the Rules throughout observe the distinction between a motion to commit and a motion for leave to issue a writ of attachment. The rule referred to by the Master of the Rolls is one of the best illustrations of this. Further, under the old practice, there was no leave required either to serve notice of motion to commit, or to issue a writ of attachment, although the former was heard in Court before the man could be committed whereas the latter issued as of course without coming before the judge at all; but now it is rightly considered inexpedient to allow any man to be imprisoned on the mere act of a party without the intervention of the Court, and accordingly Order XLIV., r. 2, provides that no writ of attachment shall be issued without leave of the Court or a judge, to be applied for on notice to the party against whom attachment is to be issued. That is supplemented by r. 4 of

C. A. 1911

TAYLOR, PLINSTON BROTHERS & CO., LIMITED v. PLINSTON.

Farwell L.J.

Order LII., which says: "Every notice of motion to set aside, remit, or enforce an award, or for attachment, or to strike off the rolls, shall state in general terms the grounds of the application; and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion." It is plain that Order XLIV., r. 2, does not apply in terms to a motion to commit, and to my mind it is equally plain that Order LII., r. 4, does not apply either, for it is in terms limited to a motion for attachment, which is the short way of saying "leave to issue a writ of attachment." It cannot be the true construction to hold that it includes a motion to commit so as to alter the old practice where no alteration was requisite.

I agree that the decision should be reversed.

BUCKLEY L.J. I cannot discover in Order LII., r. 4, any general ground of policy which would lead me to extend the rule beyond its literal meaning. It is said that a motion for attachment and a motion for committal are motions affecting the liberty of the subject, and that a motion to strike off the rolls is a punitive motion, that in such cases it is desirable that a man should have at the earliest moment notice of what is alleged against him, and that therefore a copy of the affidavit stating the grounds of the application ought to be served with the notice of motion. This is true, but is that the policy of the rule? It cannot be so, because the rule extends to a motion to set aside, remit, or enforce an award. There is no ground of policy which requires that a copy of the affidavit should be served with the notice of motion in that case. These seem to be instances of cases in which Order LII., r. 4, adopted and continued the practice which had previously prevailed in those cases of serving the affidavit with the notice of motion. There is no public ground of policy in the matter. That being so, the words in this rule are "Every notice of motion for attachment." The Rules recognize two methods of affecting the liberty of the subject: one attachment, the other committal. Those methods are discriminated in Order XLII., r. 7. Order LII., r. 4, speaks of a motion for attachment. That means, I think, a motion for leave to

issue a writ of attachment. It is confined to that case and does not extend to a motion to commit. On these grounds I think that the decision was erroneous, and that this appeal ought to be allowed.

COZENS-HARDY M.R. The appeal will be allowed with costs and the motion will be remitted to Warrington J. to be dealt with on the merits.

Solicitors: *W. Drake; Meredith, Mills & Clark, for H. T. Smith, Southport.*

H. B. H.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 2, 1911, will be as follows:—

In the First Series,
[1911] 1 Ch. [1911] 2 Ch.

In the Second Series,
[1911] 1 K. B. [1911] 2 K. B. [1911] P.

In the Third Series,
[1911] A. C.

INDEX.

ACCELERATION — Life estate — Contingent Remainders Act, 1877 – – **374**
See WILL. 4.

ACCOUNT—Trade mark — Passing-off action—Account of profits—Stay of account pending appeal—Practice – – **572**
See TRADE MARK. 1.

ACCUMULATIONS—Will—Gift of capital and accumulations of income at twenty-six—Gift whether vested or contingent
See WILL. 3. **510**

ADEMPTION—Special power by will or deed—Rule against double portions – **165**
See POWER OF APPOINTMENT.

ADMINISTRATION—*Administration Action—Practice—Sale of Real Estate—Conditional Contract—Order of Master approving Contract—Order not passed and entered—Finality of Order—Adjournment to Judge.*

An order made by a Master in chambers is not complete and binding on the parties until it is passed and entered. Although the settled practice in chambers is that an adjournment of a summons to be heard by the judge will not be granted unless an application is made to the Master, at the time when the summons is heard by him, either for an adjournment or for time to consider whether an adjournment shall be asked for, yet the Master or the judge has jurisdiction at any time before the Master's order becomes finally binding on the parties by being passed and entered to adjourn the summons to be heard by the judge.

Dictum of Malins V.-C. in *In re Bartlett* (1880) 16 Ch. D. 561, 568, distinguished.

In a creditors' action to administer an intestate's estate the usual judgment had been pronounced directing, amongst other things, a sale of the real estate in case the personal estate should be insufficient for the payment of the debts. A conditional contract had been entered into for the sale of the real estate, which on a summons taken out by the plaintiff had been confirmed by the Master in chambers, but the order had not been passed and entered. On

ADMINISTRATION—*continued.*

applications by creditors for liberty to attend the proceedings under the administration judgment on the ground that the sale was at an undervalue, and by the purchaser that the order confirming the sale might be forthwith passed and entered and the sale carried into effect:—

Held that, the Master's order not having been passed and entered, the matter was still open, and the proper course was to treat the summons to confirm the sale as adjourned to the judge.

Held, also, on the facts, that the contract was not one which the Court ought to sanction
In re THOMAS. BARTLEY *v.* THOMAS
Warrington J. 389

2. —— *Order for Sale—Conversion.*

An absolute order for sale within the jurisdiction of the Court in an administration action operates as a conversion from the date of the order. FAUNTLEROY *v.* BEEBE – **C. A. 257**

—— Executor.
See under EXECUTOR.

—— Practice—Parties—Real estate—Action by single creditor—Land Transfer Act **348**
See PRACTICE. 3.

—— Probate.
See under PROBATE.

—— Small estate, Administration of—Date for ascertaining value – – – **545**
See TRUSTEE. 2.

ADVANCEMENT — Hotchpot — Interest on advances—Division of residue so as to secure equality of portions – – **581**
See WILL. 1.

AFFIDAVIT — Committal — Attachment — Motion to commit—Service of copy of affidavit – – – – – **605**
See ATTACHMENT.

ALLOTMENT — Company — Directors — Allotment by quorum being less than minimum number—Invalidity—Estoppel
See COMPANY. 3. **430**

AMALGAMATION—Railway companies – **173**
See RAILWAY. 2.

ANNUITY — Indian civil servant — Retiring annuity or pension —Liability to assignment or sequestration – – **199**
See INDIA.

APPOINTMENT—Power of.
See under POWER OF APPOINTMENT.

ASSIGN—Lease—Covenant not to assign without consent—Fine for consent – – **1**
See LANDLORD AND TENANT.

ASSIGNMENT—Administration bond—Practice
See PROBATE. **488**

—— Executor—Liability—Testator's leaseholds —Assignment by executor to a "purchaser" — Meaning — Payment to assignee — Covenant by assignee to indemnify – – – – – **530**
See EXECUTOR. 2.

—— Indian civil servant—Retiring annuity or pension — Liability to assignment or sequestration – – – – **199**
See INDIA.

ATTACHMENT—*Practice—Committal—Motion to commit—Service of Copy of Affidavit—Rules of the Supreme Court*, 1883, *Order* LII., *r.* 4.

By Order LII., r. 4, "Every notice of motion . . . . for attachment . . . . shall state in general terms the grounds of the application; and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion":—

Held, that the rule did not apply to a motion to commit, and consequently that upon a motion to commit a copy of the affidavit upon which the motion was founded need not be served with the notice of motion.

Litchfield v. *Jones* (1883) 25 Ch. D. 64, discussed.

Decision of Warrington J. [1911] 2 Ch. 368, reversed. TAYLOR, PLINSTON BROTHERS & CO., LIMITED *v.* PLINSTON – – **C. A. 605**

ATTORNEY-GENERAL — Valuation of land—Threat of penalty for non-compliance —Relief against Crown—Declaratory judgment — Attorney-General defendant – – – – – **139**
See REVENUE.

BIGAMOUS MARRIAGE.
See under MARRIAGE.

CASES:—

—— *Accles, Ld., In re* – [1902] W. N. 162
Distinguished. *In re* PICCADILLY HOTEL, LIMITED. PAUL *v.* PICCADILLY HOTEL, LIMITED [**1911**] **2 Ch. 534**

—— *Amalgamated Society of Railway Servants* v. *Osborne* [1910] A. C. 87.
The principle laid down in, considered. WILSON *v.* AMALGAMATED SOCIETY OF ENGINEERS – [**1911**] **2 Ch. 324**

CASES—*continued.*

—— *Andrews* v. *Bridgman* [1908] 1 K. B. 596.
Followed and affirmed. WEST *v.* GWYNNE – – – [**1911**] **2 Ch. 1**

—— *Bald, In re* – – (1897) 76 L. T. 462
Distinguished. *In re* PRYCE. LAWFORD *v.* PRYCE – [**1911**] **2 Ch. 286**

—— *Bartlett, In re*, (1880) 16 Ch. D. 561, 568.
Dictum of Malins V.-C. in, distinguished. *In re* THOMAS. BARTLEY *v.* THOMAS – – – [**1911**] **2 Ch. 389**

—— *Bartlett* v. *Franklin* (1867) 36 L. J. (Ch.) 671.
Distinguished. EDMONDSON *v.* COPLAND – – – [**1911**] **2 Ch. 301**

—— *Born, In re* – – [1900] 2 Ch. 433
Applied. *In re* METER CABS, LIMITED [**1911**] **2 Ch. 557**

—— *Borthwick* v. *Elderslie Steamship Co.* [1905] 2 K. B. 516.
Distinguished. ASHOVER FLUOR SPAR MINES, LIMITED *v.* JACKSON [**1911**] **2 Ch. 355**

—— *Carrick* v. *Errington* (1726) 2 P. Wms. 361, affirmed by the House of Lords sub nom. *Errington* v. *Carrick* (1728) 5 Bro. P. C. 391.
Discussed and applied. *In re* SIR WALTER SCOTT – [**1911**] **2 Ch. 374**

—— *Central London Ry. Co.* v. *City of London Land Tax Commissioners* [1911] 1 Ch. 467.
Reversed – – [**1911**] **2 Ch. 467**

—— *Chicago and North West Granaries Co., In re*, [1898] 1 Ch. 263.
Followed. *In re* TEWKESBURY GAS COMPANY – – [**1911**] **2 Ch. 279**

—— *Cooper's Trusts, In re*, [1873] W. N. 87.
Followed. *In re* POPE'S CONTRACT [**1911**] **2 Ch. 442**

—— *Christiansen's Trade Mark, In re*, (1886) 3 Rep. Pat. Cas. 54, 63.
Applied. *In re* "CARVINO" TRADE MARK – – – [**1911**] **2 Ch. 572**

—— *Dean* v. *Allen* – (1855) 20 Beav. 1, 4
Applied. *In re* LAWLEY. JACKSON *v.* LEIGHTON – – [**1911**] **2 Ch. 530**

—— *Debenture Corporation, Ld.* v. *Uttoxeter Brewery, Ld.*, noted in Palmer's Company Precedents, 10th ed. pt. iii. p. 737.
Followed on one point. *In re* PICCADILLY HOTEL, LIMITED. PAUL *v.* PICCADILLY HOTEL, LIMITED [**1911**] **2 Ch. 534**

CASES—*continued.*

—— *Dodson* v. *Sammell* (1861) 1 Dr. & Sm. 575, 579.
Applied. *In re* LAWLEY. JACKSON *v.* LEIGHTON – – [1911] **2 Ch. 530**

—— *Dyson* v. *Attorney-General* [1911] 1 K. B. 410.
Followed. BURGHES *v.* ATTORNEY-GENERAL – – [1911] **2 Ch. 139**

—— *Emden* v. *Carte* – (1881) 19 Ch. D. 311
Applied. *In re* METER CABS, LIMITED [1911] **2 Ch. 557**

—— *Evans* v. *Levy* – [1910] 1 Ch. 452, 457
Overruled as to costs. WEST *v.* GWYNNE – – [1911] **2 Ch. 1**

—— *Grand Junction Waterworks Co.* v. *Hampton Urban Council* [1898] 2 Ch. 331.
Distinguished. BURGHES *v.* ATTORNEY-GENERAL – [1911] **2 Ch. 139**

—— *Great Western Ry. Co.* v. *Bennett* (1867) L. R. 2 H. L. 27.
Discussed. LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* HOWLEY PARK COAL AND CANNEL COMPANY – – [1911] **2 Ch. 97**

—— *Griffith-Boscawen* v. *Scott* (1884) 26 Ch. 358.
Followed. *In re* HORSFALL [1911] **2 Ch. 63**

—— *Guy* v. *Churchill* – (1887) 35 Ch. D. 489
Applied. *In re* METER CABS, LIMITED [1911] **2 Ch. 557**

—— *Hadley, In re* – – [1909] 1 Ch. 20
Followed. *In re* PRYCE. LAWFORD *v.* PRYCE – – – [1911] **2 Ch. 286**

—— *Harvey* v. *Harvey* (1884) 26 Ch. D. 644, 654.
Dictum of Chitty J. in, followed. TAYLOR, PLINSTON BROTHERS & CO. *v.* PLINSTON – – [1911] **2 Ch. 368**

—— *Haynes* v. *Ford* – – [1911] 1 Ch. 375
Affirmed – – [1911] **2 Ch. 237**

—— *Hill, In re* – – (1886) 33 Ch. D. 266
Applied. *In re* METER CABS, LIMITED [1911] **2 Ch. 557**

—— *Howe* v. *Smith* – – (1884) 27 Ch. D. 89
Followed. HALL *v.* BURNELL [1911] **2 Ch. 551**

—— *Hyam* v. *Terry* – (1880) 29 W. R. 32
Applied. *In re* "CARVINO" TRADE MARK – – – [1911] **2 Ch. 572**

—— *Jackson* v. *De Kadich* – [1904] W. N. 168
Discussed. HALL *v.* BURNELL [1911] **2 Ch. 551**

CASES—*continued.*

—— *Jones* v. *Turnbull* – (1837) 2 M. & W. 601
Applied. *In re* METER CABS, LIMITED [1911] **2 Ch. 557**

—— *Jenkins* v. *Price* – [1907] 2 Ch. 229, 235.
Overruled as to costs. WEST *v.* GWYNNE [1911] **2 Ch. 1**

—— *Joseph Crosfield & Sons, Ld., In re*, [1910] 1 Ch. 130, 148.
Remarks of Fletcher Moulton L.J. in, with reference to laudatory epithets, applied. *In re* POPE'S ELECTRIC LAMP COMPANY'S APPLICATIONS [1911] **2 Ch. 382**

—— *Lacon's Settlement, In re, Lacon* v. *Lacon*, [1911] 1 Ch. 351.
Reversed – – [1911] **2 Ch. 17**

—— *Lawson* v. *Wright* – (1786) 1 Cox, 275,
Explained. STIRLING *v.* BURDETT [1911] **2 Ch. 418**

—— *Litchfield* v. *Jones* – (1883) 25 Ch. D. 64
Discussed. TAYLOR, PLINSTON BROTHERS & CO. *v.* PLINSTON [1911] **2 Ch. 605**

—— *Marriott* v. *Chamberlain*, (1886) 17 Q. B. D. 154.
Discussed. NASH *v.* LAYTON [1911] **2 Ch. 71**

—— *Massey, In re* – (1870) L. R. 9 Eq. 367
Applied. *In re* METER CABS, LIMITED [1911] **2 Ch. 557**

—— *Mégret, In re* – – [1901] 1 Ch. 547
Distinguished. *In re* PRYCE. LAWFORD *v.* PRYCE – – [1911] **2 Ch. 286**

—— *Midland Ry. Co.* v. *Great Western Ry. Co.* (1873) L. R. 8 Ch. 841.
The principle of, applied. GREAT CENTRAL RAILWAY COMPANY *v.* MIDLAND RAILWAY COMPANY [1911] **2 Ch. 173**

—— *Minchin* v. *Minchin* (1871) I. R. 5 Eq. 258, 267.
Decision of Lord O'Hagan, L.C. of Ireland, in, followed. *In re* HORSFALL [1911] **2 Ch. 63**

—— *Moss* v. *Gallimore* – (1779) 1 Doug. 279
Principle of, not affected. *See In re* IND, COOPE & CO. **Warrington J.** [1911] **2 Ch. 223**

—— *Nerot* v. *Burnand* – (1826) 2 Russ. 56
Applied. *In re* "CARVINO" TRADE MARK – – – [1911] **2 Ch. 572**

—— *Nixon's Navigation Co., In re*, [1897] 1 Ch. 872.
Followed. *In re* THOMAS DE LA RUE & CO., LIMITED AND REDUCED [1911] **2 Ch. 361**

—— *Noble* v. *Cass* – – (1828) 2 Sim. 343
Referred to. *In re* LACON'S SETTLEMENT – – – [1911] **2 Ch. 17**

CASES—*continued.*

—— *Pearson* v. *Dolman* (1866) L. R. 3 Eq. 315, 321.
Dictum of Wood V.-C. in, approved. *In re* LORD NUNBURNHOLME [1911] 2 Ch. 510

—— *Pouey* v. *Hordern* – – [1900] 1 Ch. 492
Distinguished. *In re* PRYCE. LAWFORD *v.* PRYCE – [1911] 2 Ch. 286

—— *Ravensworth, In re* – [1905] 2 Ch. 1
Distinguished. *In re* EARL OF SHEFFIELD – – – [1911] 2 Ch. 267

—— *Rees, In the Goods of* – [1896] W. N. 57
Followed. COPE *v.* BENNETT [1911] 2 Ch. 488

—— *Rogers* v. *Humphreys* (1835) 4 Ad. & E. 299.
Principle of, not affected. *See In re* IND, COOPE & CO.
Warrington J. [1911] 2 Ch. 223

—— *Sandrey* v. *Michell* – (1863) 3 B. & S. 405
Distinguished. COPE *v.* BENNETT [1911] 2 Ch. 488

—— *Snowden, Ex parte* – (1811) 17 Ch. D. 44
Explained. STIRLING *v.* BURDETT [1911] 2 Ch. 418

—— *Taylor, Plinston Brothers & Co. v. Plinston* [1911] 2 Ch. 368.
Reversed – – [1911] 2 Ch. 605

—— *Toulmin* v. *Steere* – – (1817) 3 Mer. 210
Distinguished. MANKS *v.* WHITELEY [1911] 2 Ch. 448

—— *Vawdry* v. *Geddes* (1830) 1 Russ. & My. 203.
Distinguished. *In re* LORD NUNBURNHOLME – – – [1911] 2 Ch. 510

—— *Waller* v. *Barrett* (1857) 24 Beav. 413, 420
Applied. *In re* LAWLEY. JACKSON *v.* LEIGHTON – – [1911] 2 Ch. 530

—— *Watling* v. *Lewis* – [1911] 1 Ch. 414
Referred to. *In re* TEWKESBURY GAS COMPANY – – [1911] 2 Ch. 279

—— *West Riding of Yorkshire Rivers Board* v. *Preston* (1904) 69 J. P. 1.
Referred to. ATTORNEY-GENERAL *v.* LEWES CORPORATION [1911] 2 Ch. 495

—— *West Riding of Yorkshire Rivers Board* v. *Reuben Gaunt & Sons, Ld.* (1902) 67 J. P. 183.
Referred to. ATTORNEY-GENERAL *v.* LEWES CORPORATION [1911] 2 Ch. 495

—— *Worthington & Co.'s Trade Mark, In re,* (1880) 14 Ch. D. 8.
Applied. *In re* "CARVINO" TRADE MARK – – – [1911] 2 Ch. 572

"CASH"—Meaning of—Company—Winding-up—Registration – – – – 41
See COMPANY, 5.

CHALK PIT—"Dangerous place"—Excavation "in any situation fronting, adjoining, or abutting on" a street—Power of local authority to fence – – 133
See LOCAL GOVERNMENT. 1.

CHARGING ORDER—Costs—Solicitor.
See under SOLICITOR.

CIVIL SERVANT — Indian civil servant — Retiring annuity or pension—Liability to assignment or sequestration – 199
See INDIA.

COLONY—"Colony"—Colonial Stock Acts, 1877 to 1900—Trustees—Investment – 58
See TRUSTEE.

COMMITTAL—Attachment—Motion to commit—Service of copy of affidavit – 605
See ATTACHMENT.

COMPANY — *Debenture — Construction — Principal repayable "on or after" a specified Date —Power of Company to repay by Drawings— Due Date of Principal—Inadmissibility of Prospectus to explain Meaning of Debenture — Provisions void for Repugnancy.*

A company issued a series of debentures each of which contained a covenant by the company that it would "on or after" January 1, 1898, pay to the registered holder of the debenture the principal sum thereby secured. The debenture then stated as follows: "The debentures to be paid off will be determined by ballot, and six calendar months' notice will be given by the company of the debentures drawn for payment."

The company never paid off any of the debentures or held any ballot, but after January 1, 1898, one of the debenture-holders gave the company six calendar months' notice to pay off her debenture, and, at the expiration of the notice, commenced an action to enforce her security:—

Held, that on the construction of the covenant and in the events that had happened the principal money secured by the plaintiff's debenture was presently due and payable, and that, if the provision as to balloting and notice meant that the company was never to be bound to pay off any debenture unless it elected to do so and balloted and gave notice accordingly, the provision was void for repugnancy on the principle stated in Sheppard's Touchstone, p. 273, and illustrated in *Watling* v. *Lewis* [1911] 1 Ch. 414.

Quære, whether on that principle the principal money was not, any time after January 1, 1898, due on demand.

In determining a question as to the construction of a debenture the Court cannot refer to the prospectus pursuant to which the debenture was issued.

In re Chicago and North West Granaries Co. [1898] 1 Ch. 263, followed. *In re* TEWKESBURY GAS COMPANY. TYSOE *v.* THE COMPANY
Parker J. 279

2. —— *Debentures—Remuneration of Trustees —Quantum—Period—Lien.*

B debenture stock issued by the above company was secured by a trust deed (called the B

COMPANY—*continued.*

security) on the general assets and on the site of a hotel, with a "primary trust for conversion" when the B security became enforceable.

Clause 18 provided that the B trustees should hold the moneys to arise under the primary trust for conversion upon trust that they should thereout in the first place pay or retain their costs and expenses "including the remuneration of the B trustees" and should apply the residue in payment of the B stockholders, and should pay the surplus (if any) to the company.

Clause 34 provided that the company should pay the B trustees a fixed remuneration per annum to continue payable until the trusts of the B security should be finally wound up and whether or not a receiver should be appointed or the trusts should be administered by the Court.

The B security became enforceable and a receiver was appointed in a B stockholder's action. This receiver was superseded by a receiver appointed in an action by the trustees of a prior lien security, to which action the B trustees were parties, and in which their security was established.

The hotel was actually sold by the prior lien trustees, the entire purchase-money being received and paid by them into Court in pursuance of an order in the prior lien action. The B trustees joined in the conveyance.

After discharging the prior lien a considerable surplus was left in Court for the B stockholders :—

Held, that the B trustees were entitled to their fixed contractual remuneration under clause 34 until the trusts of the B security were finally wound up, and under clause 18 to a lien on the surplus proceeds of sale in Court in priority to the B stockholders.

Debenture Corporation, Ld. v. *Uttoxeter Brewery, Ld.*, noted in Palmer's Company Precedents, 10th ed. pt. iii. p. 737, followed on the latter point.

In re Accles, Ld. [1902] W. N. 164, distinguished.

In re PICCADILLY HOTEL, LIMITED. PAUL *v.* PICCADILLY HOTEL, LIMITED
Swinfen Eady J. 534

3. —— *Rectification of Register on Application of Company—Allotment—Minimum Number of Directors—Quorum—Power for Continuing Directors to act — Minimum Number never appointed—Allotment by Quorum being less than Minimum Number — Invalidity — Estoppel — Practice.*

The articles of association of a company provided that the number of directors should not be less than four or more than eight; that the two vendors should be the first directors; that the first directors should have power before the first general meeting to appoint additional directors but so that the number should not exceed seven; that continuing directors might act notwithstanding any vacancy; that three directors should be a quorum. The two first directors appointed a third, and the three held board meetings and allotted shares, including 2000 shares which were allotted as fully paid by

COMPANY—*continued.*

way of commission to M., the promoter of the company. M. had transferred some of his shares to H., the solicitor of the company, partly as a gift and partly in payment of his costs, and others to bona fide purchasers. The company never really commenced business and was ordered to be wound up compulsorily on the petition of shareholders. The vendors, who had acted honestly, paid all the debts of the company and repaid the "bona fide" shareholders what they had paid, taking transfers of their shares. The liquidator took out a summons in the name of the company to rectify the register by striking off the names of M. and H. M. and H. had full notice and knowledge of the articles and the circumstances, but the effect of striking off their names would be to leave the vendors the only shareholders of the company and enable them to take back their property :—

Held, that, there never having been a properly constituted board of directors, the allotments made by the three directors could not be justified either because they were a quorum or because they were continuing directors; that the original allotment to M. was bad, and nothing in the circumstances estopped the company from applying to rectify the register, and the names of M. and H. must be removed.

In re SLY, SPINK & CO. – **Neville J. 430**

4. —— *Reduction of Share Capital—Scheme—Confirmation—Dissentient Shareholder—Costs—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 46.

A scheme for the reduction of the share capital of a company comes within s. 46 of the Companies (Consolidation) Act, 1908, although it differentiates between the holders of the same class of shares to the extent of paying off some and not others, and imposes upon the shareholders whose shares are to be extinguished the obligation to accept debenture stock in lieu of cash, and also involves the advance to the company of the moneys to be utilized in redemption of the share capital by the very persons whose shares are to be redeemed.

In re Nixon's Navigation Co. [1897] 1 Ch. 872, followed.

In confirming the scheme as on the whole fair and equitable the Court made it a term of its confirmation that the costs of a dissentient shareholder, who had assisted the Court by his criticism of the scheme, should be provided by the petitioning company.

In re THOMAS DE LA RUE & CO., LIMITED AND REDUCED – – – – **Eve J. 361**

5. —— *Winding-up—Floating Charge within Three Months of Winding-up — Meaning of "Cash"—Agreement for Floating Charge—Registration — Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 93, 212.

The object of s. 212 of the Companies (Consolidation) Act, 1908, was to prevent insolvent companies from creating floating charges to secure past debts or for moneys which do not go to swell their assets and become available for creditors.

COMPANY—*continued.*

The term "cash" in s. 212 is not to be interpreted by the light of the decisions as to the meaning of that term in s. 25 of the Companies Act, 1867.

Where moneys are advanced to secure the liability of a company under an antecedent independent guarantee, debentures giving a floating charge created by the company in favour of the guarantors, who find money to pay off the debt owing by the company and guaranteed by them, are, if the company goes into winding-up within three calendar months after the issue of the debentures, invalid unless it is proved that the company was solvent immediately after the creation of the charge.

Quære whether it is necessary to register under s. 93 of the Act an agreement by a company to give a debenture containing a floating charge on its assets, where no debenture has actually been issued.

In re ORLEANS MOTOR COMPANY, LIMITED **Parker J. 41**

—— Debenture — Mortgage — Priority—Specific mortgage—Floating charge– – **223**
See MORTGAGE. 1.

—— Railway company.
See under RAILWAY.

—— Solicitor — Lien—Arbitration — Claim by company—Winding-up—Compromise—Costs prior to liquidation — Costs of establishing retainer by liquidators **557**
See SOLICITOR. 2.

—— Solicitor — Lien — Mortgage—Retainer by trustee for debenture-holders — Trust deed—Costs incurred prior to execution of deed – – – – – **85**
See SOLICITOR. 3.

—— Trustees—Investment—Power to invest in preference stock—Fully-paid preference shares not within power – – **563**
See WILL. 6.

—— Waterworks company.
See under WATER.

COMPENSATION—Licensing Acts.
See under LICENSING ACTS.

CONDITION—Will—Gift to wife "during her widowhood" — Bigamous marriage—Definition of period — Knowledge of parties – – – – – **342**
See WILL. 7.

CONDITIONAL CONTRACT.
See under CONTRACT.

CONFLICT OF LAWS—*Power of Appointment—Exercise — General Power under English Settlement—Donee a Domiciled Dutchwoman—Gift by Will in Dutch Form—Admission to Probate in England—Limited Power of Disposition—Dutch Law—English Law—Effect of Exercise of Power.*

Under the will of her father an English lady had a general power of appointment by will over certain funds in England. She married a Dutch gentleman and acquired a domicil in Holland. By Dutch law her power of disposition was limited to seven eighths of her property, her mother, in the events which happened, being entitled to one eighth as "legitimate portion." By her will, which was in Dutch form but admitted to probate in England, she appointed her husband as "sole heir of the whole of which the law in force at the time of her death should allow her to dispose in his favour," and also appointed him executor, with all requisite powers, including the right to take possession of all her real and personal properties according to law. According to Dutch law the exercise of the power had the effect of making the appointed property her assets for all purposes:—

Held, that by English law also the lady had by exercising the power made the appointed property her assets for all puposes; that her power of disposition over it was no greater than over property to which she was absolutely entitled; and consequently that her husband was only beneficially entitled to seven eighths of the appointed property.

Pouey v. *Hordern* [1900] 1 Ch. 492, *In re Mégret* [1901] 1 Ch. 547, and *In re Bald* (1897), 76 L. T. 462, distinguished.

In re Hadley [1909] 1 Ch. 20, followed.

In re PRYCE. LAWFORD *v.* PRYCE **C. A. 286**

CONFLICT OF LAWS—*continued.*

CONTINGENT LEGACY—Will — Gift whether vested or contingent – – – **510**
See WILL. 3.

CONTINGENT REMAINDERS—Acceleration of life estate – – – – – **374**
See WILL. 4.

CONTRACT — Administration action — Conditional contract – – – **389**
See ADMINISTRATION. 1.

—— Vendor and purchaser
See under VENDOR AND PURCHASER.

CONTRACTOR—Negligence.
See SEWAGE.

CONTRIBUTION—Co-sureties—Joint and several guarantee—Different limits of liability—Debt payable by instalments.
See PRINCIPAL AND SURETY. **418**

CONVERSION—Administration—Order for sale
See ADMINISTRATION. 2. **257**

CONVEYANCING AND LAW OF PROPERTY—Lease—Covenant not to assign without consent—Fine for consent – – **1**
See LANDLORD AND TENANT.

—— Mortgage — Company — Debenture — Priority—Specific mortgage—Floating charge – – – – – **223**
See MORTGAGE. 1.

COSTS—Company — Dissentient shareholder—Reduction of share capital—Scheme—Confirmation – – – – **361**
See COMPANY. 4.

COSTS—*continued.*

—— Declaratory order—Lease—Covenant not to assign without consent—Fine for consent – – – – – – 1
See LANDLORD AND TENANT.

—— Extraordinary Tithe Redemption Act — Compulsory redemption—Payment into Court — Application for investment
See PRACTICE. 1. 438

—— Solicitor.
See under SOLICITOR.

COURT OF PROBATE ACTS.
See under PROBATE.

CREDITOR—Practice—Parties—Administration —Real estate—Action by single creditor—Land Transfer Act – – 348
See PRACTICE. 3.

CROWN—Valuation of land—Threat of penalty for non-compliance — Relief against Crown—Declaratory judgment—Attorney-General defendant—Action – 139
See REVENUE.

DAMAGES—*Interest—Trespass on Mines—Judgment — Referee — Report — Date from which Interest to run—Practice—Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *ss.* 17, 18.

By a consent order dated July 18, 1910, an action for an injunction to restrain a trespass on mines and for damages was compromised on the terms that it should be referred to a special referee to ascertain the damages, and the defendants were to pay the amount so found. On June 1, 1911, the special referee reported that 1515*l.* was payable by the defendants to the plaintiffs. Upon motion by the plaintiffs that the referee's report might be adopted, the question was raised as to whether interest was payable on the damages, and from what date :—

Held, that as the order of July 18, 1910, was not one whereby a sum of money was payable by the defendants to the plaintiffs within s. 18 of the Judgments Act, 1838, inasmuch as a further order was necessary, interest on the damages was not payable from the date of the order.

Borthwick v. *Elderslie Steamship Co.* [1905] 2 K. B. 516, distinguished.

But *held* that, there being in effect an agreement to pay on certificate, interest at 4*l.* per cent. on the sum certified ran from the date of the referee's report on June 1, 1911. ASHOVER FLUOR SPAR MINES, LIMITED *v.* JACKSON Eve J. 355

—— Settled land—Mansion house—Capital or income. – – – – – 17
See SETTLED LAND. 1.

"DANGEROUS PLACE"—Chalk pit—Street—Power of local authority to fence 133
See LOCAL GOVERNMENT. 1.

DEBENTURE-HOLDERS AND DEBENTURES —Company.
See under COMPANY.

DEBENTURES—Company
See under COMPANY.

DECEASED WIFE'S SISTER'S MARRIAGE ACT, 1907 – – – – 275
See HUSBAND AND WIFE.

DECLARATORY JUDGMENT — Valuation of land – – – – – – 139
See REVENUE.

DECLARATORY ORDER — Costs — Lease — Covenant not to assign without consent—Fine for consent – – – 1
See LANDLORD AND TENANT.

DEED—*Party joined for Specific Purpose—Inference as to Joinder for other Purposes—Effect of Errors in Recital and Parcels—Power —Appointment.*

Where a person joins as a party to a deed for a specific purpose, he cannot from that fact alone be considered as having joined for a totally different purpose, e.g., that of disposing by the deed, or thereby recognizing the disposal, of property which is thereby purported to be dealt with by other parties to the deed.

H. by his will, made in 1855, specifically devised real estate in trust for his daughter E. for life, and gave her a power of appointment over the property amongst her children. He also bequeathed upon similar trusts one-half of his residuary personalty.

E. married in 1858, and on her marriage part of the real estate so devised in trust was conveyed by H. upon trust for her for life, and on her death in favour of her children as she should by deed or will appoint.

H. died in 1861, and in 1871 a part of the real estate so devised in trust which was not included in the settlement was sold under a power in the will, and the proceeds of sale were invested, the investments being held by the trustees of the will together with the investments representing the residuary personalty. In 1891 E. became one of the trustees of the will, and in 1896, immediately before the marriage of S., one of her daughters, E. appointed to S. (subject to her own life interest) one fifth part of her share in the residuary personalty. The deed contained an erroneous recital that by the settlement on E.'s marriage H. had conveyed all the specifically devised real estate upon the trusts contained in that settlement for the benefit of E. and her children. On the next day by the marriage settlement of S. and F., to which they and E. were parties, S. assigned the one fifth share to which she was entitled in expectancy on the death of E., under the appointment, in the moiety of the residuary personalty and the investments representing the same, "which investments, so far as they comprise or include such moiety, are specified in the schedule hereto," upon the trusts of the new settlement. The schedule included investments representing the proceeds of the part of the specifically devised real estate which had been sold. The settlement contained a covenant by E. to pay S. an annuity :—

Held, that the appointment by E. extended to a fifth of her moiety of the residuary estate

DEED—*continued.*

only, and not to any part of the proceeds of sale, and that by the joinder of E. as a party to the settlement a share of the proceeds of sale was not appointed or disposed of.

Griffith-Boscawen v. *Scott* (1884) 26 Ch. D. 358, and the decision of Lord O'Hagan, L.C. of Ireland, in *Minchin* v. *Minchin* (1871) I. R. 5 Eq. 258, 267, followed. *In re* HORSFALL. HUDLESTON *v.* CROFTON – – **Parker J. 63**

DEPOSIT—Vendor and purchaser—Specific performance—Contract — Deposit—Stakeholder – – – – – **551**
See VENDOR AND PURCHASER. 1.

DIRECTORS—Company.
See under COMPANY.

DISCOVERY—Interrogatories—Material facts—Loan – – – – – **71**
See PRACTICE. 2.

DIVIDENDS—Waterworks company — Several classes of shareholders—Special Act **520**
See WATER.

DUTCH LAW—Power of appointment—Exercise—English law—Effect of exercise of power – – – – – **286**
See CONFLICT OF LAWS.

EAST INDIA.
See under INDIA.

ELECTRIC LIGHT—*Breaking up Street—Street not repairable by Local Authority—Ultra vires—Trespass—Electric Lighting Act*, 1882 (45 & 46 *Vict. c.* 56), *ss.* 12, 13—*Electric Lighting (Clauses) Act*, 1899 (62 & 63 *Vict. c.* 19), *Schedule*, *s.* 12, *sub-s.* 2.

Under ss. 6 and 7 of the Gasworks Clauses Act, 1847, as adapted to electric lighting undertakings by the Electric Lighting Act, 1882, the undertakers are empowered to break up streets, subject to certain restrictions. By s. 13 of the Act of 1882 (which is substantially repeated in s. 12, sub-s. 2, of the schedule to the Electric Lighting (Clauses) Act, 1899), nothing in that Act or in any Act incorporated therewith shall authorize the undertakers to break up any street which is not repairable by the local authority without the consent of the person by whom such street is repairable or the written consent of the Board of Trade to be given after notice to such person and after an opportunity has been given to him to state his objections thereto :—

Held (Kennedy L.J. dissenting), that, where there was no person by whom the street was repairable, the section operated as an absolute prohibition against the breaking up of the street by the undertakers.

Held, therefore, that, where a strip of land adjoining a street repairable by the local authority had been dedicated to the public by the owner and had become part of the street, but was not repairable either by the local authority or by the owner or by any other person, the local authority, as undertakers for the supply of electric light in their district, had no power

ELECTRIC LIGHT—*continued.*

to break up that portion of the street. ANDREWS *v.* ABERTILLERY URBAN DISTRICT COUNCIL **C. A. 398**

ENCLOSURE—Turnpike—Waste — Presumption —Evidence—Tithe map – – **331**
See HIGHWAY.

ESTOPPEL — Company — Directors—Allotment by quorum being less than minimum number—Invalidity – – – **430**
See COMPANY. 3.

EVIDENCE—Tithe map — Turnpike —Waste—Enclosure—Presumption – – **331**
See HIGHWAY.

EXECUTOR—*Administration — Right to pledge Personal Chattels—Pledge by Executor many Years after Death of Testator—Payment of Debts—Realization and Distribution of Assets.*

A testator, who died in 1878, by his will, after appointing two executors and giving certain pecuniary legacies, gave his residuary estate to his executors upon trust for sale and distribution as therein mentioned. In 1892 one of the executors, without the knowledge of his co-executor, pawned certain plate of the testator's with the defendants, who had no notice that he was not the true owner thereof, and he misapplied the money advanced upon it to his own purposes. At the date of the pledge all the testator's legacies and debts so far as they were known had been paid, but the residuary estate had not been completely realized or distributed. On the death of the pledgor an action was brought by his co-executor and a new trustee to recover the plate :—

Held, that the pledgor had not at the time of the pledge ceased to be executor, that his right to pledge still existed, and that the defendants were entitled to the plate subject to redemption. SOLOMON *v.* ATTENBOROUGH – **Joyce J. 159**

2. —— *Liability — Testator's Leaseholds — Assignment by Executor to a "Purchaser"—Meaning—Payment to Assignee—Covenant by Assignee to Indemnify—Law of Property Amendment Act*, 1859 (22 & 23 *Vict. c.* 35), *s.* 27—*Lord St. Leonards' Act.*

An assignment by an executor of his testator's leasehold property to an assignee who is paid money for taking over the lease and indemnifying the executor is not an assignment to a "purchaser" within s. 27 of the Law of Property Amendment Act, 1859.

The word "purchaser" in this section means a person who buys the lease and pays a price in money for it.

Dodson v. *Sammell* (1861) 1 Dr. & Sm. 575, 579 ; *Dean* v. *Allen* (1855) 20 Beav. 1, 4 ; and *Waller* v. *Barrett* (1857) 24 Beav. 413, 420, applied. *In re* LAWLEY. JACKSON *v.* LEIGHTON – – – – **Swinfen Eady J. 530**

FENCE—"Dangerous place"—Chalk pit—Street —Power of local authority to fence **133**
See LOCAL GOVERNMENT. 1.

FINANCE ACTS.
See under REVENUE.

FINE—Lease—Covenant not to assign without consent—Fine for consent – – **1**
See LANDLORD AND TENANT.

FORFEITURE—Specific performance—Contract—Deposit—Stakeholder—Rescission of contract — Forfeiture of deposit — Practice – – – – – **551**
See VENDOR AND PURCHASER. 1.

GUARANTEE — Co-sureties — Contribution — Joint and several guarantee—Different limits of liability—Debts payable by instalments – – – – **418**
See PRINCIPAL AND SURETY.

HIGHWAY — *Turnpike — Waste — Enclosure — Presumption—Evidence—Tithe map—Injunction —Turnpike Roads Act*, 1822 (3 *Geo.* 4, *c.* 126), *ss.* 118, 124.

Where the lord of a manor encloses a strip of land by the side of a public highway and within a few feet only from the metalled portion of the road, then, whatever the presumption might have been before, a presumption thereafter arises that what he has left between the metal and his fence is dedicated to the public.

Any presumption as to the extent of a public right of way ought to be drawn with reference to all the circumstances existing at the time when the question as to the extent of the public right arises. It is not right to raise a presumption from a state of circumstances proved to have existed thirty or fifty years ago, ignoring all that has happened since.

A tithe map is not admissible as evidence of the extent of a public right of way, though it may be evidence that part of the land was not used at the time when the map was made for such purposes as to make it tithable.

The expression in s. 118 of the Turnpike Roads Act, 1822, "common or waste land on the side or sides of any turnpike road" means land not separated from the road by any existing fence; and "common or waste land" does not include land which has been enclosed from the road in part since the middle of the last century and in part from 1892, when a previous fence was erected. COPESTAKE *v.* WEST SUSSEX COUNTY COUNCIL – – – – **Parker J. 331**

—— "Dangerous place"—Chalk pit—Excavation—Power of local authority to fence.
See LOCAL GOVERNMENT. 1. **133**

—— Land tax—Redemption—Land abutting on highway—Exoneration ad medium filum—Presumption – – – **467**
See LAND TAX.

HOTCHPOT—Advancement — Interest on advances—Division of residue so as to secure equality of portions – – **581**
See WILL. 1.

HOUSING, TOWN PLANNING, &c., ACT — Insanitary dwellings—Closing order—Statutory form—Omission of note to form—Injunction – – – **312**
See LOCAL GOVERNMENT. 2.

HUSBAND AND WIFE — *Marriage with Deceased Wife's Sister—Death of Husband before* 1907—*Death intestate of Son of First Marriage—Next of Kin—Interest in Expectancy —Spes Successionis—Deceased Wife's Sister's Marriage Act*, 1907 (7 *Edw.* 7, *c.* 47), *ss.* 1, 2.

Sect. 1 of the Deceased Wife's Sister's Marriage Act, 1907, applies to and makes valid a marriage with a deceased wife's sister although, owing to the death of one of the parties, the assumed relationship of husband and wife had ceased to exist before the date of the passing of the Act.

The spes successionis which the brother of a person has during his lifetime to a share of his property, as one of his next of kin, in the event of his dying intestate, is not an "interest in expectancy" protected by s. 2 of the Act. *In re* GREEN. GREEN *v.* MEINALL – **Warrington J. 275**

INDIA — *Pensions — Indian Civil Servant — Retiring Annuity or Pension — Liability to Assignment or Sequestration—East India Annuity Funds Act*, 1874 (37 & 38 *Vict. c.* 12)—*Pensions Act*, 1871 (*India*) (*Act No. XXIII. of* 1871), *ss.* 4, 11, 12.

The East India Annuity Funds Act, 1874, did not terminate the existence of the Civil Annuity Funds therein referred to or make the Pensions Act, 1871 (India), applicable to annuities payable to retiring Indian civil servants as pensions granted or continued by the Government of India within the meaning of s. 11 of the Pensions Act, 1871.

The retiring annuity or pension of a covenanted member of the Indian Civil Service is not subject to the restrictions imposed by ss. 11 and 12 of the Pensions Act, 1871 (India), and is liable to sequestration in the High Court of Justice in England.

Decision of Joyce J. affirmed.

Semble, that the Pensions Act, 1871 (India), applies only to British India and has no application to proceedings in England, and does not operate to defeat, in England, assignments of or charges on annuities or pensions of retiring Indian civil servants. KNILL *v.* DUMERGUE **C. A. 199**

INJUNCTION—Highway.
See under HIGHWAY.

INSANITARY DWELLINGS—Closing order—Statutory form—Omission of note to form—Injunction – – – **312**
See LOCAL GOVERNMENT. 2.

INTEREST—Advancement—Hotchpot—Interest on advances—Division of residue so as to secure equality of portions – **581**
See WILL. 1.

—— Notice by mortgagee to pay off—Failure to pay on date named—Right to interest subsequent to tender—Readiness to pay—Keeping money idle – – **301**
See MORTGAGE. 2.

—— Trespass on mines—Judgment—Referee—Report—Date from which interest to run – – – – – – **355**
See DAMAGES.

INTERPRETATION ACT—"Colony"—Trustees—Investment – – – – **58**
See TRUSTEE. 1.

INTERROGATORIES.
See under DISCOVERY.

INVESTMENT—Land purchased by trustees as investment under power—No express power to vary investments—Implied power – – – – – **442**
See VENDOR AND PURCHASER. 2.

—— Trustees—Power to invest in preference stock—Fully-paid preference shares not within power – – – – **563**
See WILL. 6.

—— Trustees — Stocks or securities of any "British colony or dependency" — Definition – – – – – **58**
See TRUSTEE. 1.

JUDGMENT—Declaratory—Valuation of land
See REVENUE. **139**

—— Interest — Referee — Report — Date from which interest to run—Practice—Trespass on mines – – – – **355**
See DAMAGES.

JUDICATURE ACT, 1873—Mortgage—Company—Debenture—Priority—Specific mortgage—Floating charge – – **223**
See MORTGAGE. 1.

LAND TAX—*Redemption—Land abutting on Highway—Exoneration ad medium filum—Presumption—Subsequent Construction of Underground Railway—Part under Highway—Exemption from Assessment—Revenue—Land Tax Act*, 1797 (38 *Geo.* 3, *c.* 5), *ss.* 4, 17, 18, 80—*Land Tax Redemption Act*, 1802 (42 *Geo.* 3, *c.* 116), *ss.* 8, 38.

Where the land tax upon land adjoining a public highway has been redeemed, the presumption that the soil of the highway ad medium filum belongs to the owner of the adjoining land applies so as to extend the exoneration from tax to the middle of the highway.

A railway was constructed, under statutory powers, partly beneath a highway adjoining lands which had been previously exonerated from land tax:—

Held by Cozens-Hardy M.R. and Kennedy L.J. (Farwell L.J. dissenting), that the portion of the railway under the moiety of the highway abutting on the exonerated lands was not liable to land tax.

Decision of Swinfen Eady J. on this point [1911] 1 Ch. 467, reversed.

CENTRAL LONDON RAILWAY COMPANY *v.* CITY OF LONDON LAND TAX COMMISSIONERS **C. A. 487**

LAND TRANSFER—Parties—Administration—Real Estate—Action by single creditor
See PRACTICE. 3. **348**

LAND VALUATION—Revenue.
See under REVENUE.

LANDLORD AND TENANT—*Lease—Covenant not to assign without Consent—Fine for Consent—Lease made before Commencement of Act—Retrospective Construction—Declaratory Order—Costs—Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 3.

Sect. 3 of the Conveyancing and Law of Property Act, 1892, applies to all leases whether executed before or after the commencement of the Act, and, in the absence of express provision to the contrary, engrafts upon every covenant in any such lease against assignment or underletting without consent a proviso that no money shall be payable in respect of such consent. If a lessor refuses to give a consent except upon payment, the lessee is relieved from obtaining his consent and can make a valid assignment or underlease without it; but he is also entitled to bring an action for a declaration to that effect, in which costs will be given him though no relief is asked for beyond the declaration.

Andrew v. *Bridgman* [1908] 1 K. B. 596, followed and affirmed.

Jenkins v. *Price* [1907] 2 Ch. 229, 235, and *Evans* v. *Levy* [1910] 1 Ch. 452, 457, overruled as to costs. WEST *v.* GWYNNE – – **C. A. 1.**

LEASEHOLDS—Executor—Liability—Testator's leaseholds—Assignment by executor to a "purchaser"—Meaning – – **530**
See EXECUTOR. 2.

LEGACY—Will—Construction.
See under WILL.

LICENSING ACTS—Settled estate—Tenant for life and remainderman—Extinction of licence—Compensation – – **350**
See SETTLED LAND. 2.

LIEN—Company — Debentures — Remuneration of trustees—Quantum—Period – **534**
See COMPANY. 2.

—— Solicitor.
See under SOLICITOR.

LIQUIDATOR—Company.
See under COMPANY.

LOCAL GOVERNMENT—"*Dangerous Place*"—*Chalk Pit—Excavation "in any situation fronting, adjoining, or abutting on" a Street—Intervening Strip of Land—Power of Local Authority to fence—Public Health Acts Amendment Act*, 1907 (7 *Edw.* 7, *c.* 53), *ss.* 3, 30, 31.

The Public Health Acts Amendment Act, 1907, s. 30, enacts with respect to the enclosing of dangerous places, that "if in any situation fronting, adjoining, or abutting on any street . . . . any excavation or bank" is for want of sufficient enclosure dangerous to persons lawfully using the street, the local authority may require the owner to enclose the same so as to prevent any danger therefrom and, on his default, may enclose the same and recover the expense thereof from him summarily as a civil debt.

An unfenced ancient chalk pit was separated from a highway that was a street by an unfenced strip of land of varying width. The defendant was the owner of the strip of the land but not of the pit. From erosion caused by the weather

LOCAL GOVERNMENT—*continued.*

a few feet of the strip of land had in course of years fallen or slipped down into the pit so that the edge of the pit had become enlarged and was now within the strip of land :—

Held, that the pit was "in a situation fronting, adjoining, or abutting on" the highway and, on the evidence, was a danger to persons lawfully using the highway ; and, therefore, that the local authority had power under the section to require the defendant to erect a fence on his strip of land enclosing the pit. CARSHALTON URBAN DISTRICT COUNCIL *v.* BURRAGE – – – – **Neville J. 133**

2. —— *Insanitary Dwellings—Closing Order—Statutory Form—Omission of Note to Form — Injunction — Local Government Order, January* 11, 1910, *Form* 5—*Housing, Town Planning, &c., Act*, 1909 (9 *Edw.* 7, *c.* 44), *ss.* 17, 39, 41.

A local authority in exercise of their powers under s. 17, sub-s. 2, of the Housing, Town Planning, &c., Act, 1909, served a closing order upon the owner of a dwelling-house in their district on the ground that it was in a state so dangerous or injurious to health as to be unfit for human habitation. The closing order followed the statutory form prescribed by an Order of the Local Government Board made under s. 41 of the Act, except that it omitted the "note" at the foot of the form setting out s. 17, sub-s. 3, of the Act, which gives an owner served with such an order the right of appeal to the Board within fourteen days after the service of the order upon him :—

Held, that the "note" was a material part of the statutory form, and that its omission rendered the proceedings of the local authority invalid.

An injunction was accordingly granted restraining the local authority from proceeding to enforce the closing order. RAYNER *v.* STEPNEY CORPORATION – – – **Neville J. 312**

LOCAL GOVERNMENT ORDER, January 11, 1910, Form 5 – – – – **312**
See LOCAL GOVERNMENT. 2.

MANSION HOUSE—Capital or income—Lease by tenant for life—Repairing covenants **17**
See SETTLED LAND. 1.

MAP—Tithe map—Evidence—Turnpike—Waste—Enclosure—Presumption – – **331**
See HIGHWAY.

MARKET—*Statutory Market—Disturbance—Warehouse—Shop.*

The Southwark Borough Market was founded by a local Act of the reign of George II., and by an amending Act passed two years later it was provided that if any poulterer, country chapman, victualler, gardener, fruiterer, fish-seller, or any other person, should sell or expose for sale by way of hawking or otherwise any poultry, fish, fruit, herbs, oatmeal, or other victuals or provision whatsoever, in any private house, lane, alley, inn, warehouse, street, stall, common passage, or other place whatsoever, within 1000 yards

MARKET—*continued.*

of the market, but only in his own shop or shops, or in the public market place, he should be liable to a penalty. In modern times the market had become a fruit and vegetable market only, and the business carried on there was wholesale. A former salesman at the market obtained a lease of a large four-storeyed building fronting the market. He used the ground floor for the sale of fruit and vegetables, the second and third floors for the storage of goods intended for immediate sale and for the ripening of bananas, and the fourth floor for domestic purposes. The business which he carried on on these premises was a wholesale business, and he sold goods on commission as well as goods of his own.

In an action by the market authorities for an injunction to restrain him from carrying on this business :—

Held, that the defendant was carrying on business in his own shop within the meaning of the Act and that the action failed.

Decision of Neville J. [1911] 1 Ch. 375, affirmed. HAYNES *v.* FORD – – **C. A. 237**

MARRIAGE—Deceased Wife's Sister's Marriage Act, 1907—Spes successionis – **275**
See HUSBAND AND WIFE.

—— Will—Gift to wife "during her widowhood"—Bigamous marriage—Condition—Definition of period—Knowledge of parties – – – – – **342**
See WILL. 7.

MERGER—Mortgage—Priority—Reconveyance and new mortgage without notice of intermediate charge – – – **448**
See MORTGAGE. 3.

MINERALS.
See under MINES.

MINES—Interest—Trespass on mines—Judgment—Referee—Report—Date from which interest to run – – – **355**
See DAMAGES.

—— Railway — Minerals — Support — Mines lying beyond the forty yards limit **97**
See RAILWAY. 1.

MONEY-LENDER — Discovery—Interrogatories—Loan – – – – – **71**
See PRACTICE. 2.

MORTGAGE — *Company — Debenture—Priority — Specific Mortgage — Floating Charge — Assignment — Rent in arrear — Drawbacks—Debts—Notice—Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 5—*Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 10.

The principle of *Moss* v. *Gallimore* (1779) 1 Doug. 279, and *Rogers* v. *Humphreys* (1835) 4 Ad. & E. 299, that the mortgagor is in possession and receives the rents of the mortgaged property only by leave of the mortgagee, and the mortgagee is the reversioner expectant on leases of the mortgaged property and is entitled on taking possession of it to all arrears of rent in respect of

leases made before the date of the mortgage, or subsequently thereto by authority of the mortgagee, is not affected by the provisions of s. 25, sub-s. 5, of the Judicature Act, 1873, or s. 10 of the Conveyancing Act, 1881, which deal with procedure only.

A company issued debenture stock secured by a trust deed whereby certain freehold and leasehold properties were specifically mortgaged to the trustees of the deed, and a floating charge was created in their favour on all the assets of the company. Subsequently the company assigned to W. and H. certain book debts, including rents in arrear in respect of leases, some of which were specifically included in the trust deed, and also certain drawbacks owing to the company by the Crown in respect of beer exported by the company on which the company was entitled to receive payments equal to the amount of the Excise brewing duty paid thereon. W. and H. gave notice of their assignment to the tenants from whom rents were due and to the shipping agents who had been employed by the company to export the beer; but gave no notice to the Crown. A receiver and manager of the assets and undertaking of the company was appointed on behalf of the debenture-holders. He gave notice of his appointment to the tenants and to the Crown:—

Held, that the rents in arrear in respect of property not specifically charged belonged to W. and H., but the rents of property specifically mortgaged belonged to the debenture-holders inasmuch as they had taken possession by the appointment of a receiver and giving notice; that the drawbacks were only subject to the floating charge and could be dealt with by the company; and that, as the company had this power by their contract with the debenture-holders, the latter could not, with notice of the assignment, obtain priority to the assignees by giving notice to the Crown. *In re* IND, COOPE & Co. FISHER *v.* THE COMPANY. KNOX *v.* THE COMPANY. ARNOLD *v.* THE COMPANY
Warrington J. 223

2. —— *Notice by Mortgagee to pay off—Failure to pay on Date named—Subsequent Tender improperly refused—Mortgagee's Right to Fresh Notice or Six Months' Interest—Right to Interest subsequent to Tender—Readiness to pay—Keeping Money idle—Mortgagor and Mortgagee.*

The defendant, a mortgagee, gave the plaintiff, the mortgagor, notice to pay off the mortgage, and that in default of payment within three months she intended to sell the property. Before the expiration of the three months some correspondence took place as to the execution of the reconveyance, and the matter was not completed on the day when the three months expired, but a week later the plaintiff tendered the amount of principal and interest to date, which the defendant refused to accept on the ground that the plaintiff must give a six months' notice to pay off or pay six months' interest in lieu thereof. The plaintiff then took out a summons for redemption, upon which the common order was made. The Master by his certificate found what was due upon the mortgage at the date of the

tender, and that a good tender had been made by the mortgagor and refused by the mortgagee. He also fixed the time and place for payment, not allowing any interest subsequent to the tender. The plaintiff attended at the time and place with the money accordingly, but the defendant failed to attend. On a summons to vary the certificate:—

Held, that a good tender having been made, the plaintiff was not bound under the circumstances to give a fresh notice or pay six months' interest. But *held*, further, that the plaintiff, who had not actually set the money aside, was liable for interest from the date of tender to the date of actual payment, he having had the use of the mortgagee's money all that time.

Bartlett v. *Franklin* (1867) 36 L. J. (Ch.) 671, distinguished. EDMONDSON *v.* COPLAND
Joyce J. 301

3. —— *Priority — Merger — Reconveyance and New Mortgage without Notice of Intermediate Charge—Effect of Release of Part of Security.*

O. in 1900 mortgaged the Lower Brow Farm to A., and in 1901 he gave M. a collateral security on the same property and on the Gibbett Street property (on which M. had already a first mortgage for 500*l.*). In 1905 O. gave A. a further charge on the Lower Brow Farm. In 1907 O. agreed to sell this farm to L., who obtained the money to pay off A.'s mortgage from F., L. supplying the money required to pay off A.'s further charge. The transaction was carried out by (1.) a reconveyance by A. to O. free from A.'s mortgage and further charge, (2.) a conveyance by O. to L., and (3.) a mortgage by L. to F. Neither L. nor F. had knowledge or notice of M.'s further charge, the fact of the existence of which was suppressed by O. Both the properties were in Yorkshire and all the securities were duly registered in the West Riding Registry.

M., O., and L. in 1910 arranged that L. should purchase the Gibbett Street property for 500*l.*, of which she paid M. 50*l.*, the balance being advanced by a building society. M. transferred the balance of 450*l.* due to him to the society, and conveyed to it the Gibbett Street property subject to a new proviso for redemption but freed from all claims under M.'s collateral security of 1901. O. then conveyed the equity of redemption to L.:—

Held, (1.) that A.'s mortgage and further charge on the Lower Brow Farm had not merged by the transaction of 1907, but that F.'s security had priority over M.'s collateral security of 1901; but (2.) that the release in 1910 of the Gibbett Street property by M. from that security would not disentitle him to enforce his charge on the Lower Brow Farm.

Toulmin v. *Steere* (1817) 3 Mer. 210, distinguished.

The subject of merger of charges considered. MANKS *v.* WHITELEY – – **Parker J. 448**

—— Solicitor—Lien—Retainer by trustee for debenture-holders—Trust deed – **85**
See SOLICITOR. 3.

NEGLIGENCE—Public body—Contract for discharge of duty — Liability for contractor's negligence—Public health **188**
See SEWAGE.

NEXT OF KIN—Marriage with deceased wife's sister—Death of husband before 1907—Interest in expectancy – – **275**
See HUSBAND AND WIFE.

NOTE—Statutory form—Closing order—Insanitary dwellings—Omission of note to form—Injunction – – – **312**
See LOCAL GOVERNMENT. 2.

NOTICE — Company — Debenture — Priority — Specific mortgage—Floating charge—Assignment – – – – **223**
See MORTGAGE. 1.

—— Mortgagee, Notice by, to pay off—Failure to pay on date named—Subsequent tender improperly refused—Right to interest subsequent to tender – **301**
See MORTGAGE. 2.

PASSING-OFF ACTION—Trade mark—Account of profits—Stay of account pending appeal—Practice – – – **572**
See TRADE MARK. 1.

PATENT—*Extension of Term as to some only of Claims—Condition as to granting Compulsory Licences—Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *s.* 18.

Letters patent were granted for an invention as to wireless telegraphy of great merit, in respect of which the inventor had been inadequately remunerated, and the commercial development of which had been impeded by various causes. An application for an extension of the term of the patent was opposed by the Crown mainly on the ground that all systems of wireless telegraphy involved the use of means shewn in the patent, and that the patentee had never taken steps to prevent the use of such means by others :—

Held, that the Court had power to extend the patent as to one or more of its claiming clauses without extending it as to all of them, and that the patent must be extended as to some only of the claiming clauses for seven years from the expiration of the existing patent, subject to a condition making it incumbent on the patentee to grant licences to all who desired to make use of the protected invention on such terms as an arbitrator appointed by the Board of Trade should think fit and reasonable. *In re* LODGE'S PATENT – – – – – **Parker J. 46**

PENSIONS—Indian civil servant—Retiring annuity or pension—Liability to assignment or sequestration – – **199**
See INDIA.

PLEDGE—Executor—Right to pledge personal chattels—Pledge by executor many years after death of testator – **159**
See EXECUTOR. 1.

PORTIONS—Advancement—Hotchpot—Interest on advances—Division of residue so as to secure equality of portions – **581**
See WILL, 1.

PORTIONS—*continued*

—— Special power by will or deed — Rule against double portions – – **165**
See POWER OF APPOINTMENT.

POWER OF APPOINTMENT—*Special Power by Will or Deed—Appointment by Will among all Objects equally—Subsequent Appointment by Deed to two of several Objects—Ademption—Rule against Double Portions.*

By his will, dated in 1869, a testator, who had a power under the settlement upon his first marriage to appoint certain funds in favour of all and every one or more of his children, grandchildren, or other issue by any marriage, appointed the same equally among all the children of his second marriage who should be living at his death. There were seven children, all of whom survived him. By two deeds executed respectively in 1897 and 1901 he appointed a seventh share of the settled funds to each of two of these children. He died in 1910 –

Held, that the rule against double portions applied, and that consequently the children to whom appointments had been made by deed were not entitled to any further share under the will. *In re* PEEL'S SETTLEMENT. BIDDULPH *v.* PEEL – – – – – **Joyce J. 165**

—— Exercise — Dutch law — English law — Effect of exercise of power – – **286**
See CONFLICT OF LAWS.

PRACTICE — *Costs — Extraordinary Tithe Redemption Act*, 1886 (49 & 50 *Vict. c.* 54), *s.* 5, *sub-s.* 4 — *Compulsory Redemption — Payment into Court—Application for Investment.*

The Dean and Chapter of Canterbury Cathedral were the owners of extraordinary tithe charged on the lands of W. W. applied to the Board of Agriculture for compulsory redemption, and under their direction paid the assessed amount of redemption money into Court. The Dean and Chapter applied by summons for investment of the redemption money. The Extraordinary Tithe Redemption Act provides that the money may be dealt with as if it were money paid in under the Tithe Commutation Acts. None of these Acts contain any direction as to costs :—

Held, that the Court had jurisdiction to deal with the costs, and they must be paid by W., the landowner seeking compulsory redemption. *In re* GRAHAM-WIGAN – – **Neville J. 438**

2. —— *Discovery—Interrogatories—Material Facts — Loan — Defence that Plaintiff was a Money-lender and was not registered—Interrogatories as to previous Loan Transactions—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *ss.* 2, 6.

An action was brought to enforce a charge given by the borrower to secure a loan with interest at 10 per cent. upon certain surplus moneys held on his behalf by the trustees of a private Act of Parliament which authorized them to raise a fund for the payment of the borrower's debts existing at the date of the Act. The trustees, who were defendants to the action, raised the defence that the plaintiff was a

PRACTICE—*continued.*

money-lender within the meaning of the Money-lenders Act, 1900, and was not registered under that Act:—

Held (Fletcher Moulton L.J. dissenting), that these defendants were entitled to administer interrogatories to the plaintiff as to what (if any) other loans he had transacted during a reasonable period before the loan in question in the action, and on what security and at what rate of interest, and generally as to the circumstances and terms of such loans, as being facts relevant to the issue raised by the defence; but that they were not entitled to require the plaintiff to disclose the names of the borrowers.

Marriott v. *Chamberlain* (1886) 17 Q. B. D. 154, discussed. NASH *v.* LAYTON – **C. A. 71**

3. —— *Parties — Administration — Real Estate—Creditor—Action by Single Creditor—Rules of the Supreme Court*, 1883, *Order III., r.* 4; *Order XVI., r.* 9; *Order LV., rr.* 3 *and* 4—*Land Transfer Act*, 1897 (60 *&* 61 *Vict. c.* 65), *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 2.

If a creditor desires administration of real estate of a person who died after the date of the Land Transfer Act, 1897, it is no longer necessary that he should sue on behalf of all the creditors. *In re* JAMES. JAMES *v.* JONES **Warrington J. 348**

—— Service—Attachment — Motion to commit —Service of copy of affidavit – **605**
See ATTACHMENT.

PREFERENCE SHARES—Company.
See under COMPANY.

PRESUMPTION — Land tax — Redemption—Land abutting on highway—Exoneration ad medium filum – – **467**
See LAND TAX.

—— Turnpike—Waste — Enclosure — Evidence —Tithe map – – – – **331**
See HIGHWAY.

PRINCIPAL AND SURETY—*Co-sureties—Contribution — Joint and Several Guarantee — Different Limits of Liability—Debt payable by Instalments—Payment of Instalments by one Co-surety—Right to Contribution—Proportion of whole Debt.*

The plaintiffs and defendants executed a deed in May, 1907, whereby they jointly and severally guaranteed repayment of 15,000*l.* advanced on mortgage, interest thereon payable half-yearly, and premiums on a policy of insurance; and their respective liabilities were limited to maxima of various amounts. The 15,000*l.* was not to be called in for ten years. The plaintiffs had paid various sums for interest and premiums, and the amounts thus paid were more than their due proportion of the total of the interest and premiums paid, but not of the entire debt, and did not reach their respective limits:—

Held, that the 15,000*l.*, interest, and premiums constituted one debt; that, until the plaintiffs had paid more than their due proportion of the entire debt, they could not call on the defendants to contribute; and that it was

PRINCIPAL AND SURETY—*continued.*

immaterial that the plaintiffs had paid more than their share of the part which had become due.

Lawson v. *Wright* (1786) 1 Cox, 275, and *Ex parte Snowden* (1881) 17 Ch. D. 44, explained. STIRLING *v.* BURDETT – **Warrington J. 418**

PRIORITY — Mortgage—Company— Debenture —Specific mortgage—Floating charge
See MORTGAGE. 1. **223**

—— Mortgage—Merger—Reconveyance and new mortgage without notice of intermediate charge – – – – – **448**
See MORTGAGE. 3.

PROBATE—*Administration Bond—Assignment — Practice — Summons before Registrar — Assignees—Representative Capacity—Right to sue in own Names—Court of Probate Act*, 1857 (20 *&* 21 *Vict. c.* 77), *s.* 83—*Court of Probate Act*, 1858 (21 *&* 22 *Vict. c.* 95), *s.* 3.

An order for the assignment of an administration bond under s. 83 of the Court of Probate Act, 1857, may be made by a registrar of the Probate Division on a summons.

In the Goods of Rees [1896] W. N. 57, followed.

Registrar's report on this practice adopted.

The assignees, though bound to hold all moneys recovered as trustees for all persons interested in the estate, need not sue in a representative capacity, but may sue simply in their own names.

Sandrey v. *Michell* (1863) 3 B. & S. 405, distinguished. COPE *v.* BENNETT **Swinfen Eady J. 488**

PROSPECTUS — Company— Inadmissibility of prospectus to explain meaning of debenture—Provision void for repugnancy – – – – – **279**
See COMPANY. 1.

PUBLIC AUTHORITIES PROTECTION — Damages—Sewage—Flooding of private land—Continuous injury—Damages—Injunction – – – – **495**
See STREAM.

PUBLIC BODY—Negligence—Contract for discharge of duty — Liability for contractor's negligence—Public health **188**
See SEWAGE.

PUBLIC HEALTH—"Dangerous place"—Chalk pit — Excavation — Street — Power of local authority to fence – – **133**
See LOCAL GOVERNMENT. 1.

—— Sewage.
See under SEWAGE.

PUBLIC TRUSTEE.
See under TRUSTEE.

PURCHASER—Executor—Liability — Testator's leaseholds—Assignment by executor to a "purchaser"—Meaning – – **530**
See EXECUTOR. 2.

PURCHASER—*continued.*

—— Vendor and.
See under VENDOR AND PURCHASER.

RAILWAY — *Minerals — Support—Mines lying beyond the Forty Yards Limit—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77, 78, 79.

The mining sections (ss. 77 to 85) of the Railways Clauses Consolidation Act, 1845, do not apply to mines lying outside the forty yards or other prescribed limit under s. 78; consequently a railway company enjoys the common law right of lateral support for its railway from mines lying outside the prescribed limit.

Great Western Ry. Co. v. *Bennett* (1867) L. R. 2 H. L. 27, discussed.

A railway company by purchasing a stratum of coal or other minerals underlying its railway in lieu of paying compensation under s. 78 does not acquire any additional right of support from subjacent or adjacent mines lying within the prescribed limit.

The mining sections of the Railways Clauses Consolidation Act, 1845, are not confined to lands acquired by a railway company under its compulsory powers, but extend to lands acquired by voluntary purchase after the expiration of its compulsory powers. LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* HOWLEY PARK COAL AND CANNEL COMPANY **C. A. 97**

2. —— *Running Powers over another Line—General Traffic — Railway Junction by third Company for limited Traffic—Amalgamation of Running Company with Junction Railway—Effect of Amalgamation—Railways Clauses Act*, 1863 (26 & 27 *Vict. c.* 92), *ss.* 38, 39, 41, 55.

Under a special Act of 1865 the plaintiff company obtained general running powers over the defendant company's M. to W. line. In 1897 the Derbyshire Railway Company, whose line crossed the defendant company's said line at S., constructed under the powers of a special Act a short line (called the S. curve) and a junction connecting their line with the defendant company's said line at S., and, under an agreement with the defendant company, were granted running powers over so much of the defendant company's line as lay between the junction and a colliery on the defendant company's line for coal traffic to and from the colliery by way of the S. curve and junction.

In 1906 the plaintiff company and the Derbyshire Railway Company were amalgamated under a special Act which incorporated the amalgamation provisions of the Railways Clauses Act, 1863, and the Derbyshire Railway Company was dissolved. The plaintiff company then claimed that, as owners of the Derbyshire Railway Company's undertaking, they were entitled to bring general traffic over the S. curve and junction and then, by virtue of their general running powers under the Act of 1865, to pass such traffic over the defendant company's line to and from M. The defendant company insisted that under ss. 38 and 39 of the Railways Clauses Act, 1863, the plaintiff company's right to use the S. curve and junction was limited to such rights as were possessed by the Derbyshire

RAILWAY—*continued.*

Railway Company at the time of the amalgamation:—

Held, that where one railway company has general running powers over the line of another railway company, the running company may exercise their powers at any point at which they can get lawful access to the owning company's line in the absence of express prohibition or agreement to the contrary.

Held, therefore, that as the plaintiff company had under the Act of 1906 acquired a lawful right of access by means of the S. curve and junction to the defendant company's line at the junction, they were entitled to exercise the right they claimed.

The principle of *Midland Ry. Co.* v. *Great Western Ry. Co.* (1873) L. R. 8 Ch. 841, applied. GREAT CENTRAL RAILWAY COMPANY *v.* MIDLAND RAILWAY COMPANY – **Neville J. 173**

—— Land tax.
See under LAND TAX.

REDEMPTION—Land tax.
See under LAND TAX.

—— Tithe.
See under TITHE.

REDUCTION OF CAPITAL—Company.
See under COMPANY.

REGISTRAR—Probate.
See under PROBATE.

REGISTRATION — Company — Winding-up — Floating charge within three months of winding-up – . – – – **41**
See COMPANY. 5.

—— Trade mark.
See under TRADE MARK.

REMOTENESS—Will—Construction – **27**
See WILL. 5.

REPUGNANCY — Company — Debenture—Construction — Provision void for repugnancy – – – – – **279**
See COMPANY. 1.

RESIDE—Specific devise of freehold house and premises "in which I now reside" – **563**
See WILL. 6.

RETAINER—Solicitor—Lien—Company—Costs prior to liquidation—Costs of establishing retainer by liquidators – – **557**
See SOLICITOR. 2.

REVENUE—*Valuation of Land—Form* 8—*Ultra vires—Requisition as to Payment or Receipt of Rent in particular District without specifying Land—Return to be made to Valuation Officer — Threat of Penalty for Non-compliance — Relief against Crown—Declaratory Judgment—Attorney-General Defendant—Action—Rules of Supreme Court*, 1883, *Order XXV., r.* 5; *Order LXVIII., r.* 1—*Finance* (1909-1910) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 26, 31.

By s. 31, sub-s. 1, of the Finance (1909-1910) Act, 1910, "Every person who pays rent in

REVENUE—*continued.*

respect of any land, and every person who as agent for another person receives any rent in respect of any land, shall, on being required by the Commissioners, furnish to them within thirty days the name and address of the person to whom he pays rent or on behalf of whom he receives rent, as the case may be" :—

Held, that the Commissioners of Inland Revenue were not entitled under the above sub-section to require the information in question as to any land by reference to a particular district or generally, but that their powers were confined to requiring such information in reference to particular land to be specified by them in their notice.

Held, also, that the expression "any land" in the sub-section had the same meaning as the expressions "land" and "the land" in s. 26 of the Act, namely, a particular piece of land under separate occupation as to which the special information mentioned in the demand for information was required.

On August 26, 1910, the plaintiff, who was a collector of rents, received through the post a notice with a form indorsed, the notice being marked and the whole document being commonly known as "Form 8," signed by one F. Atterbury, as secretary to the Commissioners of Inland Revenue. The notice was dated August 25, 1910, and by its terms required the plaintiff to make certain returns to a person therein named, and described as "land valuation officer," in respect of persons to whom he paid rent or on behalf of whom he, as agent, received any rent, and also to give the description and situation of their properties situate in or partly within the parish or place of "Plaistow South." The notice required the return to be made within thirty days from its date under a penalty, in the event of not so doing, not exceeding 50*l*. The notice and form were issued by the direction of the Commissioners of Inland Revenue under the provisions of the Finance (1909-1910) Act, 1910. The plaintiff did not fill up and return the form within the thirty days from the date of the notice, and he received a further document dated September 30, 1910, marked and known as "Form 14—Land," requesting him to complete and return the form previously sent. He did not comply with this further request.

On October 25, 1910, the plaintiff issued his writ in the action for a declaration that the form was illegal, unauthorized, and ultra vires, and that he was not under any obligation to comply with its requisitions or any of them :—

Held, that the form was unauthorized inasmuch as it did not specify the land in respect of which the information was required, and required the information to be given to a valuation officer and not to the Commissioners themselves.

Held, also, that the Court had jurisdiction under Order XXV., r. 5, to make a binding declaration of right against the Attorney-General as representing the Crown, but that the jurisdiction was discretionary and ought to be exercised with great care and with a due regard to all the circumstances of the case.

Held, further, upon the facts, that the case was one in which the discretion should be exercised in favour of the plaintiff by declaring that the form was unauthorized and that he was not under any obligation to comply with the requisitions therein contained or any of them.

Dyson v. *Attorney-General* [1911] 1 K. B. 410, followed.

Grand Junction Waterworks Co. v. *Hampton Urban Council* [1898] 2 Ch. 331, distinguished.

By Order LXVIII., r. 1, "Subject to the provisions of this Order, nothing in these rules, save as expressly provided, shall affect the procedure or practice in any of the following causes or matters : . . . . (*c*) Proceedings on the Revenue side of the King's Bench Division . . . ." :—

Held, that the Order referred only to the procedure and practice in the several causes and matters therein mentioned, and that the present cause or matter was not one of those to which the Order referred, but was governed by the ordinary rules of procedure and practice of which Order XXV., r. 5, was one. BURGHES *v.* ATTORNEY-GENERAL – **Warrington J. 139**

—— Land tax.
See under LAND TAX.

ROAD.
See under HIGHWAY.

RULES OF THE SUPREME COURT—**Order III. (Indorsement of Claim), r. 4** – **348**
See PRACTICE. 3.

Order XVI. (Parties), r. 9 – – **348**
See PRACTICE. 3.

Order XXV. (Proceedings in lieu of Demurrer), r. 5 – – – – **139**
See REVENUE.

Order LII. (Motions and other Applications), r. 4 – – – – **368**
See ATTACHMENT.

Order LV. (Chambers in the Chancery Division), rr. 3, 4 – – – **348**
See PRACTICE. 3.

Order LXVIII. (Application of Rules in Crown, &c., Cases), r. 1 – – **139**
See REVENUE.

SALE—Administration—Order for sale—Conversion – – – – – **257**
See ADMINISTRATION. 2.

—— Administration action—Sale of real estate — Conditional contract — Order of Master approving contract—Order not passed and entered—Finality of order —Adjournment to judge – – **389**
See ADMINISTRATION. 1.

SEQUESTRATION—Indian civil servant—Retiring annuity or pension—Liability to assignment or sequestration – **199**
See INDIA.

SERVANTS — Will — Construction — Legacy—Weekly wages—"Amount of one year's wages" – – – – – **267**
See WILL. 2.

SERVICE—Motion to commit—Service of copy of affidavit – – – – – **605**
See ATTACHMENT.

SETTLED LAND—*Mansion House—Capital or Income—Lease by Tenant for Life—Repairing Covenants—Breach—Dilapidations—Damages—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 53.

Where a tenant for life without impeachment of waste recovers damages from a lessee for dilapidations to the mansion house and buildings arising from breaches of repairing covenants in a lease granted by a previous tenant for life under the statutory power, the damages are not capital moneys payable to the trustees of the settlement or into Court, but must be taken to represent the damages which the tenant for life has sustained (*Noble* v. *Cass* (1828) 2 Sim. 343), and may accordingly be kept by him and used for such purposes as he may think fit. Decision of Swinfen Eady J. [1911] 1 Ch. 351, reversed. *In re* LACON'S SETTLEMENT. LACON *v.* LACON **C. A. 17**

2. —— *Tenant for Life and Remainderman—Settled Estate—Freehold Licensed Premises—Extinction of Licence—Compensation—"Persons interested in the licensed premises"—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *ss.* 2, 3.

Where licensed premises form part of a settled estate, and the licence is extinguished under the provisions of the Licensing Act, 1904, the proportion of the compensation paid to the tenant for life or to the trustees of the settlement (as the case may be) represents capital moneys of the estate.

It makes no difference if there are no trustees. In either case the tenant for life is not entitled to the compensation for his sole benefit, and the analogy of an insurance against fire by a tenant for life, not under obligation to insure, does not apply. *In re* BLADON. DANDO *v.* PORTER **Neville J. 350**

—— Power of sale — Conflicting powers of tenant for life and trustees—Consent of tenant for life—Concurrence in conveyance – – – – – **442**
See VENDOR AND PURCHASER. 2.

SEWAGE—*Public Body—Negligence—Contract for Discharge of Duty—Liability for Contractor's Negligence—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 42, 45.

The Beaconsfield Rural District Council had undertaken under powers given to them by the Public Health Act, 1875, the cleansing of cesspools in part of their district. They entered into a contract with H. that he should keep the cesspools clear. The contract did not contain any express provision as to disposal of the sewage matter emptied out of the cesspools. H.'s men had without leave deposited the sewage on the land of the plaintiffs, who brought an action against the council and H. for damages :—

Held, that the council had a duty to dispose of the sewage, and on the construction of the special contract they had not contracted with H. for the discharge of this duty and were still liable for its not being discharged.

SEWAGE—*continued.*

Held by Buckley L.J., that even if they had contracted for the discharge of this duty they would have remained liable to the plaintiffs for the contractor's failure to perform the duty. ROBINSON *v.* BEACONSFIELD RURAL DISTRICT COUNCIL – – – – – **C. A. 188**

—— "Stream" or "sewer"—Pollution—Intermittent stream—No summer flow – **495**
See STREAM.

SEWERS—"Stream" or "sewer"—Pollution—Sewage — Intermittent stream — No summer flow – – – – **495**
See STREAM.

SHAREHOLDERS AND SHARES—Company.
See under COMPANY.

SHOP—Statutory market—Disturbance—Warehouse – – – – – **237**
See MARKET.

SOLICITOR—*Costs—Charging Order—Property recovered or preserved — Proceeding — Sale—Solicitors Act*, 1860 (23 *&* 24 *Vict*, *c.* 127), *s.* 28.

In a creditor's administration action the usual decree was made on July 1, 1907. On January 26, 1910, the plaintiff entered into a conditional contract for the sale of an outstanding piece of real estate for 383*l.*; the defendant the surviving executor opposed the confirmation of this contract as being at an undervalue, and the real estate was ordered to be sold with the approbation of the judge. At this sale, of which the surviving defendant had the conduct, the property fetched 400*l.*, which was paid into Court. On January 23, 1911, on further consideration, an order was made that a sum of 64*l.* found due from the defendants the executors should be set off against their costs, and the residue of their costs and those of the plaintiff should be paid out of the fund in Court. The defendants' solicitor now applied for a charging order for his costs, under the Solicitors Act, 1860, s. 28, on the fund in Court as being property recovered or preserved in the proceedings within the meaning of the Act :—

Held, that the sale was a proceeding within the meaning of the section, and that the money in Court must be regarded as property recovered in that proceeding, though in fact nothing more was recovered, having regard to the cost of the sale ordered, than would have been received under the conditional contract.

But *held*, that the order was in the discretion of the Court, and the Court would not make it in this case, because the order on further consideration practically ordered the same costs as those for which the solicitor asked for a charge to be paid to his client out of the fund. *In re* COCKRELL'S ESTATE – – **Neville J. 318**

2. —— *Lien—Common Law Lien—Property recovered—Arbitration—Claim by Company—Winding-up — Continuance of Arbitration — Compromise—Costs prior to Liquidation—Costs of establishing Retainer by Liquidators.*

A limited company employed a solicitor to establish a claim in an arbitration. Pending the

SOLICITOR—*continued.*

arbitration the company went into liquidation, and, shortly after, the solicitor with the sanction of both liquidators compromised the claim for 29*l.* which was paid to him and credited to the liquidators :—

Held, that as the 29*l.* was recovered by the exertions of the solicitor in the arbitration he had a common law lien thereon for his costs of recovery, including the costs incurred prior to the liquidation.

Jones v. *Turnbull* (1837) 2 M. & W. 601, *Emden* v. *Carte* (1881) 19 Ch. D. 311, and *Guy* v. *Churchill* (1887) 35 Ch. D. 489 (bankruptcy cases); and *In re Massey* (1870) L. R. 9 Eq. 367, and *In re Born* [1900] 2 Ch. 433 (company cases), applied.

Held, also, that the solicitor's lien extended to the costs of establishing his retainer against one of the liquidators who disputed it.

In re Hill (1886) 33 Ch. D. 266, applied.

In re METER CABS, LIMITED

Swinfen Eady J. 557

3. —— *Lien—Mortgage—Retainer by Trustee for Debenture-holders—Trust Deed—Costs incurred prior to Execution of Deed—Claim by Debenture-holder.*

A company determined to issue mortgage debentures to be secured by a trust deed, and a trustee was proposed. The proposed trustee, who on the execution of the trust deed became the trustee for the debenture-holders, retained a solicitor to act for him in connection with the trust (the company being represented by another solicitor), and under this retainer the solicitor investigated the title of the trust property and approved the trust deed on behalf of the trustee :—

Held, that the solicitor was entitled, both as against the trustee and as against the debenture-holders, to a lien on the trust deed for all costs properly incurred in relation to the trust, notwithstanding that they were incurred before the execution of the deed.

In re DEE ESTATES, LIMITED. WRIGHT *v.* DEE ESTATES, LIMITED – – **C. A. 85**

SPECIFIC PERFORMANCE—Contract—Deposit—Stakeholder—Forfeiture of deposit—Practice– – – – – **551**
See VENDOR AND PURCHASER. 1.

SPES SUCCESSIONIS—Deceased Wife's Sister's Marriage Act, 1907 – – – **275**
See HUSBAND AND WIFE.

STAKEHOLDER—Specific performance—Contract—Forfeiture of deposit—Practice
See VENDOR AND PURCHASER. 1. **551**

STATUTES :—

I. IMPERIAL STATUTES.

1797.

38 Geo. 3, c. 5, ss. 4, 17, 18, 80—*Land Tax*– **467**
See REVENUE.

1802.

42 Geo. 3, c. 116, ss. 8, 38—*Land Tax Redemption* – – – – – – **467**
See REVENUE.

STATUTES—*continued.*

1822.

3 Geo. 4, c. 126, ss. 118, 124—*Turnpike Roads* **331**
See HIGHWAY.

1837.

1 Vict. c. 26, s. 24—*Wills* – – – **563**
See WILL. 6.

1838.

1 & 2 Vict. c. 110, ss. 17, 18—*Judgments* – **355**
See DAMAGES.

1845.

8 & 9 Vict. c. 20, ss. 77, 78, 79—*Railways Clauses Consolidation* – – – – **97**
See RAILWAY. 1.

1847.

10 & 11 Vict. c. 17, s. 75—*Waterworks Clauses*
See WATER. **520**

1857.

20 & 21 Vict. c. 77, s. 83—*Court of Probate* **488**
See PROBATE.

1858.

21 & 22 Vict. c. 95, s. 3—*Court of Probate* **488**
See PROBATE.

1859.

22 & 23 Vict. c. 35, s. 27—*Law of Property Amendment* – – – – **530**
See EXECUTOR. 2.

1860.

23 & 24 Vict. c. 127, s. 28—*Solicitors* – **318**
See SOLICITOR. 1.

1863.

26 & 27 Vict. c. 92, ss. 38, 39, 41, 55—*Railways Clauses* – – – – – **173**
See RAILWAY. 2.

1873.

36 & 37 Vict. c. 66, s. 25, sub-s. 5—*Judicature* **223**
See MORTGAGE. 1.

1874.

37 & 38 Vict. c. 12—*East India Annuity Funds*
See INDIA. **199**

1875.

38 & 39 Vict. c. 55, ss. 17, 19, 299—*Public Health*
See STREAM. **495**

—— —— ss. 42, 45 – – – – **188**
See SEWAGE.

1876.

39 & 40 Vict. c. 22, s. 16—*Trade Union Act Amendment* – – – – **324**
See TRADE UNION.

STATUTES—*continued.*

1877.

40 & 41 Vict. c. 33—*Contingent Remainders* 374
See WILL. 4.

1881.

44 & 45 Vict. c. 41, s. 10—*Conveyancing and Law of Property* – – – – 223
See MORTGAGE. 1.

1882.

45 & 46 Vict. c. 38, s. 53—*Settled Land* – 17
See SETTLED LAND. 1.

—— —— s. 56 – – – – – 442
See VENDOR AND PURCHASER. 2.

45 & 46 Vict. c. 56, ss. 12, 13—*Electric Lighting* – – – – – 398
See ELECTRIC LIGHT.

1886.

49 & 50 Vict. c. 54, s. 5, sub-s. 4—*Extraordinary Tithe Redemption* – – – 438
See PRACTICE. 1.

1889.

52 & 53 Vict. c. 63, s. 18, sub-s. 3—*Interpretation Act* – – – – – – 58
See TRUSTEE. 1.

1892.

55 & 56 Vict. c. 13, s. 3—*Conveyancing and Law of Property* – – – – 1
See LANDLORD AND TENANT.

1893.

56 & 57 Vict. c. 61, s. 1—*Public Authorities Protection* – – – – – 495
See STREAM.

1897.

60 & 61 Vict. c. 65, s. 1, sub-s. 1; s. 2, sub-s. 2—*Land Transfer* – – – – 348
See PRACTICE. 3.

60 & 61 Vict. c. ccvi., s. 27 — *Weymouth Waterworks* – – – – – 520
See WATER.

1899.

62 & 63 Vict. c. 19, Schedule, s. 12, sub-s. 2—*Electric Lighting (Clauses)* – 398
See ELECTRIC LIGHT.

1900.

63 & 64 Vict. c. 51, ss. 2, 6—*Money-lenders* 71
See PRACTICE. 2.

1904.

4 Edw. 7, c. 23, ss. 2, 3—*Licensing* – – 350
See SETTLED LAND. 2.

1905.

5 Edw. 7, c. 15, s. 9, par. 5; ss. 9, 44—*Trade Marks* – – – – – 382
See TRADE MARK. 2.

STATUTES—*continued.*

1906.

6 Edw. 7, c. 55, s. 3—*Public Trustee* – – 545
See TRUSTEE. 2.

1907.

7 Edw. 7, c. 29, s. 18—*Patents and Designs* 46
See PATENT.

7 Edw. 7, c. 47, ss. 1, 2—*Deceased Wife's Sister's Marriage* – – – – – 275
See HUSBAND AND WIFE.

7 Edw. 7, c. 53, ss. 3, 30, 31—*Public Health Acts Amendment* – – – – 133
See LOCAL GOVERNMENT. 1.

1908.

8 Edw. 7, c. 69, s. 46—*Companies (Consolidation)* – – – – – 361
See COMPANY. 4.

—— —— ss. 93, 212 – – – – 41
See COMPANY. 5.

1909.

9 Edw. 7, c. 44, ss. 17, 39, 41—*Housing, Town Planning, &c.* – – – – 312
See LOCAL GOVERNMENT. 2.

1910.

10 Edw. 7, c. 8, ss. 26, 31—*Finance* (1909–1910) *Act* – – – – – – 139
See REVENUE.

II. INDIA, STATUTES OF:—

Pensions Act, 1871 (India) (Act No XXIII. of 1871), ss. 4, 11, 12 – 199
See INDIA.

STREAM—*Pollution—Sewage—Local Authority—"Stream" or "Sewer"—Intermittent Stream—No Summer Flow—Tidal Tributary—Deposit of Sewage on Banks—Public Nuisance—Old Culvert over Part of Stream—Non-maintenance of Culvert—Flooding of Private Land—Continuous Injury—Damages—Injunction—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 17, 19, 299—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

The discharge of sewage into the channel of an intermittent stream may have the effect of converting it into a sewer although the natural flow of the pure water is not cut off. No rule to the contrary is established by *West Riding of Yorkshire Rivers Board* v. *Reuben Gaunt & Sons, Ld.* (1902) 67 J. P. 183, or *West Riding of Yorkshire Rivers Board* v. *Preston* (1904) 69 J. P. 1.

Crude sewage was discharged by a local authority into the channel of an intermittent stream which ran in an old culvert through private land and then in the open air alongside that land to a tidal river, the stream itself being tidal up to the point where the sewage entered. The local authority had not interfered with the natural flow of the stream, which only ran during the winter. In the summer the channel conveyed nothing but sewage with the exception of the tidal water with which it was diluted twice a day. Sewage was deposited on the banks of

STREAM—*continued.*

the open channel to such an extent as to constitute a public nuisance when the tide was out, and owing to the defective state of the culvert the land was constantly flooded with pent up sewage water at spring tides.

In an action by the tenant of the land and the Attorney-General at his relation for damages and an injunction :—

Held, (*a*) that notwithstanding the summer flow of fresh water and the daily flow of tidal water the channel was a sewer.

(*b*) That the periodical inundation of sewage from a sewer out of repair was a continuing cause of action, and that the relator's right to damages was not limited by the Public Authorities Protection Act, 1893, s. 1, to damages in respect of the floodings within six months before action.

(*c*) That the local authority was liable to an injunction restraining them from occasioning a nuisance by discharging crude sewage through the open channel, and from discharging it or permitting it to flow from the culvert or sewer on to the relator's land.

Semble. Although s. 299 of the Public Health Act, 1875, provides a statutory remedy by complaint to the Local Government Board in the case of a local authority making default " in the maintenance of existing sewers " it does not preclude a private individual from obtaining damages and an injunction against that local authority in respect of a common law nuisance arising from that default. ATTORNEY-GENERAL *v.* LEWES CORPORATION **Swinfen Eady J. 495**

STREET—" Dangerous place "—Chalk pit—Excavation—Power of local authority to fence – – – – – **133**
See LOCAL GOVERNMENT. 1.

—— Electric light—Breaking up street—Ultra vires—Trespass – – – – **398**
See ELECTRIC LIGHT.

SUPPORT — Minerals — Railway—Mines lying beyond the forty yards limit – **97**
See RAILWAY. 1.

SURETY—Principal and.
See under PRINCIPAL AND SURETY.

SURNAME—Trade mark—Registration—User
See TRADE MARK. 2. **382**

TENANT FOR LIFE.
See under SETTLED LAND.

TENDER—Mortgagor and mortgagee—Right to interest subsequent to tender—Readiness to pay—Keeping money idle **301**
See MORTGAGE. 2.

TITHE—Costs—Compulsory redemption — Payment into Court—Application for investment – – – – – **438**
See PRACTICE. 1.

TITHE MAP — Evidence — Turnpike—Waste—Enclosure—Presumption – – **331**
See HIGHWAY.

TITLE—Vendor and purchaser.
See under VENDOR AND PURCHASER.

TRADE MARK—*Rectification of Register—Removal of Mark—Actual Mark not calculated to deceive—User on Goods with deceptive Get-up—Proper Remedy—Passing-off Action—Account of Profits — Stay of Account pending Appeal — Practice.*

Where a word registered as a trade mark is not in itself calculated to deceive, but is used on goods in connection with and as part of a deceptive get-up, the Court, even if it restrains the get-up in a passing-off action, will refuse a motion to remove the mark from the register.

In re Christiansen's Trade Mark (1886) 3 Rep. Pat. Cas. 54, 63, and *In re Worthington & Co.'s Trade Mark* (1880) 14 Ch. D. 8, applied.

An account of profits in a passing-off action will not be stayed pending an appeal, unless irreparable injury would otherwise be caused.

Nerot v. *Burnand* (1826) 2 Russ. 56, and *Hyam* v. *Terry* (1880) 29 W. R. 32, applied.

On appeal, the decision of Swinfen Eady J. in the passing-off action was reversed ; and a cross-appeal by the plaintiffs from the refusal to rectify the register was dismissed. COLEMAN & CO., LIMITED *v.* STEPHEN SMITH & CO., LIMITED. *In re* REGISTERED TRADE MARK " CARVINO " – – – – **C. A. 572**

2. —— *Registration—Special Application—Distinctive Word — User — Surname — Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *par.* 5 ; *ss.* 9. 44.

Special applications by Pope's Electric Lamp Company, Limited, to register the word " Pope " as a trade mark for incandescent electric lamps were referred by the Board of Trade to the Court. The evidence established a prima facie case of the word having become identified by user with the goods of the applicant company :—

Held, that the word " Pope," being for all essential purposes the surname of the manufacturer of the applicant company's goods, was not in its nature adapted to distinguish them from the goods of other persons of the name of Pope, and could not become so adapted by user so as to be capable of registration as a trade mark under s. 9, par. 5, of the Trade Marks Act, 1905.

Held, also, that, even if the word could in its nature be adapted to distinguish, the Court ought not in the exercise of its discretion to make the order asked for.

Remarks of Fletcher Moulton L.J. in *In re Joseph Crosfield & Sons, Ld.*, [1910] 1 Ch. 130, 148, with reference to laudatory epithets applied. *In re* POPE'S ELECTRIC LAMP COMPANY'S APPLICATIONS – – **Warrington J. 382**

TRADE UNION—*Objects of Union — Rules—Compulsory Levies to obtain Representation on Municipal Bodies—Ultra vires—Trade Union Act*, 1876 (39 & 40 *Vict. c.* 22), *s.* 16.

The principle laid down in *Amalgamated Society of Railway Servants* v. *Osborne* [1910] A. C. 87, that trade unions as defined by Parliament have no power to levy contributions from

TRADE UNION —*continued.*

their members for the purpose of securing parliamentary representation, extends also to securing representation on municipal and other local bodies (other than boards of guardians) at any rate where the levies on the members in aid of the funds are in effect compulsory.

Quære, whether the principle applies to the administration of funds for the purposes of parliamentary and municipal elections if the sums constituting the funds are voluntarily subscribed by members of the trade union. WILSON *v.* AMALGAMATED SOCIETY OF ENGINEERS – – – – **Parker J. 324**

TRESPASS—Electric light—Breaking up street —Ultra vires – – – – **398**
See ELECTRIC LIGHT.

—— Interest—Trespass on mines—Judgment—Referee — Report — Date from which interest to run – – – – **355**
See DAMAGES.

TRUSTEE—*Investment—Stocks or Securities of any "British Colony or Dependency"—Definition—Established Expression—Provinces of the Dominion of Canada—"Colony"—Colonial Stock Acts*, 1877 *to* 1900—*Interpretation Act*, 1889 (52 *&* 53 *Vict. c.* 63), *s.* 18, *sub-s.* 3.

The trustees of a will had power thereunder to invest capital moneys arising under the Settled Land Acts in the stocks or securities of any "British colony or dependency."

The question having been raised, upon summons, whether the stocks issued by the several provinces of the Dominion of Canada came within this description :—

Held, that the trustees were not authorized to invest in any of these provincial stocks, inasmuch as the expression "British colony or dependency," or its equivalent, was well known and firmly established as part of an investment clause to be found in wills and settlements long before the passing of the first of the Colonial Stock Acts, 1877 to 1900, and ought to be construed independently of the definition in those Acts, and be held to mean the aggregation of the provinces and settlements making up the Dominion, and not the individual provinces or settlements which went to make up the Dominion. *In re* MARYON-WILSON'S ESTATE **Eve J. 58**

2. —— *Public Trustee — Administration of Small Estate — Undistributed Part of Larger Estate—"Gross Capital Value" less than* 1000*l.* —*Date for ascertaining Value—Public Trustee Act*, 1906 (6 *Edw.* 7, *c.* 55), *s.* 3—*Public Trustee Rules*, 1907, *rr.* 14—16.

Sect. 3 of the Public Trustee Act, 1906, applies throughout to the estates of deceased persons, and not to trusts created by settlements.

In the administration of a small estate by the Public Trustee, under s. 3 of the Public Trustee Act, 1906, the date for ascertaining the gross capital value of such an estate, which must be proved to be less than 1000*l.*, is the date of the application to the Public Trustee to assume

TRUSTEE—*continued.*

the administration, and not the date of the death of the deceased :—

Held, therefore, that an estate which, at the death of a deceased, was of the gross capital value of 1281*l.* 10*s.* 2*d.*, but at the date of the application to the Public Trustee had been reduced by partial distribution to 571*l.* 11*s.* 10*d.* Consols, was a small estate within the meaning of the Act. *In re* DEVEREUX. TOOVEY *v.* PUBLIC TRUSTEE – – – – **Eve J. 545**

—— Company — Debentures—Remuneration of trustees—Quantum—Period—Lien **534**
See COMPANY. 2.

—— Investment—Power to invest in preference stock—Fully-paid preference shares not within power – – – – **563**
See WILL. 6.

TRUSTEE (PUBLIC) RULES, 1907, rr. 14—16 *See* TRUSTEE. 2. **545**

TURNPIKE.
See under HIGHWAY.

ULTRA VIRES—Electric light—Breaking up street—Trespass – – – **398**
See ELECTRIC LIGHT.

—— Trade union.
See under TRADE UNION.

USER—Trade mark.
See under TRADE MARK.

VENDOR AND PURCHASER — *Specific Performance—Contract—Deposit—Stakeholder— No Express Stipulation as to Forfeiture of Deposit —Implied Term — Default of Purchaser—Rescission of Contract — Forfeiture of Deposit—Practice.*

The deposit paid upon a contract between vendor and purchaser is in the nature of an earnest or guarantee for the fulfilment of the contract as well as a part payment of the purchase-money, and a vendor obtaining rescission owing to default in completion by the purchaser is entitled to the deposit, in the absence of any express stipulation to the contrary in the contract.

Howe v. *Smith* (1884) 27 Ch. D. 89, followed.

Jackson v. *De Kadich* [1904] W. N. 168, discussed.

The fact that the deposit is in the hands of stakeholders cannot affect the respective rights of the vendor and purchaser therein. HALL *v.* BURNELL – – – – – **Eve J. 551**

2. —— *Title—Land purchased by Trustees as Investments under Power—No express Power to vary Investments—Implied Power—Power of Sale—Conflicting Powers of Tenant for Life and Trustees—Consent of Tenant for Life—Concurrence in Conveyance—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 56.

In an ordinary case a direction to a trustee to invest in particular investments implies a power to vary investments, and this implied power gives the trustees a power to sell real estate in which

VENDOR AND PURCHASER—*continued.*

they have power to invest for the occupation of a tenant for life.

Where the trustees and the tenant for life both have powers of sale, and the consent of the tenant for life is required under the Settled Land Act, 1882, s. 56, a purchaser is not entitled to insist on the tenant for life concurring in the conveyance, if there is evidence that he in fact consented, though his consent was not in writing. *In re Cooper's Trusts* [1873] W. N. 87, followed. *In re* POPE'S CONTRACT
Neville J. 442

VESTED—Will—Legacy—Gift whether vested or contingent – – – – **510**
See WILL. 3.

WAGES—Will — Construction — Legacy—"Indoor and outdoor servants"—Weekly wages—"Amount of one year's wages"
See WILL. 2. **267**

WAREHOUSE—Statutory market—Disturbance—Shop – – – – – **237**
See MARKET.

WASTE—Turnpike—Enclosure—Presumption—Evidence—Tithe map – – **331**
See HIGHWAY.

WATER—*Waterworks Company—Dividends—Several Classes of Shareholders—Special Act—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 75—*Weymouth Waterworks Act*, 1897 (60 & 61 *Vict. c. ccvi.*), *s.* 27.

The provisions of the Waterworks Clauses Act, 1847 (ss. 75 et seq.), which relate to the payments of a waterworks company's dividends refer to the maximum amount which the company can lawfully distribute by way of dividend, and do not refer to the rights of the shareholders in the company inter se.

The Weymouth Waterworks Company was incorporated by an Act of 1797, but was subjected to the provisions of an Act passed in 1855, which incorporated the Waterworks Clauses Act, 1847, and authorized a capital of 40,000*l.* to be issued; but did not fix any maximum rate of dividend on the capital. In 1907 the company was empowered to raise further capital to the amount of 60,000*l.* by an Act which contained provisions that, except as by the Act otherwise provided, the new capital or the holders thereof were to be subject and entitled to the same liabilities, rights, and privileges as if it were part of the original capital, but limiting the dividend on the further capital to 5 per cent. per annum, unless a larger dividend should be necessary at any time to make up deficiencies of former dividends. These deficiencies existed in respect of both classes of capital, and there was an anticipated annual surplus which was available towards making up the deficiencies:—

Held that, in making up the deficiencies, the company was bound to preserve, between the total amounts paid by way of back dividends to the holders of the two classes of capital, the proportions of 10 per cent. and 5 per cent. prescribed by s. 75 of the Waterworks Clauses Act, 1847, and the special Act of 1897, as the maximum dividends on the two classes of shares respectively until the arrears were paid. WEYMOUTH WATERWORKS COMPANY *v.* COODE AND HASELL – – – – – **Parker J. 520**

WATERWORKS COMPANY.
See under WATER.

WEYMOUTH WATERWORKS ACT, 1897 520
See WATER.

WIDOWHOOD—Will—Gift to wife "during her widowhood"—Bigamous marriage—Condition – – – – – **342**
See WILL. 7.

WIFE.
See under HUSBAND AND WIFE.

WILL — *Advancement — Hotchpot—Interest on Advances—Division of Residue so as to secure Equality of Portions.*

A testator by his will, made shortly after his second marriage, gave certain pecuniary legacies upon trusts for the benefit of four of his daughters by his first marriage and gave the residue of his estate, subject to a provision for his widow, upon trust for his said four daughters and the children, if any, of his second marriage in such shares as should equalize the portion of each child, including such child's share under the testator's marriage settlements, the legacies above mentioned, and the share in the residue, provided that in making such division of the residue the funds comprised in his second marriage settlement should be deemed to be divisible among the children of his second marriage immediately on his death notwithstanding the antecedent life interest of their mother therein. The testator by a codicil, made when he had three children living of the second marriage, after slightly altering the legacies given by the will and increasing the provision for the widow, directed that in the division of the residue certain preferential payments should be made to the children of the second marriage. The testator died in the lifetime of his second wife:—

Held by Parker J. and the Court of Appeal (Buckley L.J. dissenting), that the direction to secure equality of portions was a direction affecting capital only and did not involve a direction to charge any of the advanced children with notional interest, and that on the death of the widow the capital sums advanced to the respective children (including the preferential payments out of residue) ought to be brought into hotchpot without any interest thereon in the meantime. *In re* WILLOUGHBY. WILLOUGHBY *v.* DECIES – – – – – **C. A. 581**

2. —— *"Indoor and outdoor Servants"—Weekly Wages—"Amount of one year's wages"—Will—Construction—Legacy.*

A testator bequeathed to each of his "indoor and outdoor servants" who at his death should be and should for five years previously have been in his service "the amount of one year's

WILL—*continued.*

wages" in addition to what might be then actually due to them for wages :—

Held by Neville J. and the Court of Appeal, that all the indoor and outdoor servants of the testator who at his decease fulfilled the conditions as to length of service were entitled to the benefit of the bequest irrespective of whether they were hired at yearly or weekly wages.

In re Ravensworth [1905] 2 Ch. 1, distinguished. *In re* EARL OF SHEFFIELD. RYDE *v.* BRISTOW – – – – – **C. A. 267**

3. —— *Legacy—Gift of Capital and Accumulations of Income at Twenty-six — Gift whether vested or contingent—Will—Construction.*

A testator bequeathed certain shares in a company upon trust out of the income thereof to pay his son an annual sum of 3000*l.* until he should attain the age of twenty-six and, when and so soon as he should attain that age, to hold the shares and the accumulations of income arising therefrom upon trust for his son absolutely. There was no gift over. The son survived the testator and died at the age of twenty-three :—

Held, that as the gift taken as a whole was intended solely for the benefit of the son, he took an absolute vested interest on the death of his father.

Dictum of Wood V.-C. in *Pearson* v. *Dolman* (1866) L. R. 3 Eq. 315, 321, approved.

Vawdry v. *Geddes* (1830) 1 Russ. & My. 203, distinguished. *In re* LORD NUNBURNHOLME. WILSON *v.* NUNBURNHOLME – – **Neville J. 510**

4. —— *Real Estate—Limitations in strict Settlement—Legal Uses—Limitation to A. for Life, Remainder to his Sons in Tail Male, Remainder to B. for Life—Disclaimer by A. of Life Estate—No present Issue of A.—Acceleration of B.'s Life Estate—Contingent Remainders Act*, 1877 (40 & 41 *Vict. c.* 33).

Testator, by his will, devised certain freehold estates to the use of his eldest son, J., for life, with remainder to the use of his first and other sons successively in tail male, with remainder to his grandson W., the son of his second son J. S., for life, with remainders over. Then, after giving numerous legacies and annuities, the testator devised and bequeathed his real and personal estate not otherwise specifically disposed of to trustees upon trust to sell and convert, and to stand possessed of the proceeds upon the trusts therein mentioned.

J., the testator's eldest son, had disclaimed the estate for life limited to him by the will. He was married and his wife was living, but he had no issue and there was no prospect of any :—

Held, that the estate for life in remainder of W. was not accelerated by J.'s disclaimer, but that the rents and profits of the disclaimed estate during the life of J., so long as he had no son, formed part of the testator's residuary estate and were distributable as income of that estate.

Carrick v. *Errington* (1726) 2 P. Wms. 361, affirmed by the House of Lords sub nom. *Errington* v. *Carrick* (1728) 5 Bro. P. C. 391, discussed and applied. *In re* SIR WALTER SCOTT. SCOTT *v.* SCOTT – **Warrington J. 374**

5. —— *Remoteness — Gift to Daughter of Testatrix for life—Gift over after Death of Daughter and any Husband with whom she might intermarry—Power—Exercise—Validity.*

The testatrix gave her residuary estate to trustees upon trust to pay one-fifth of the income thereof to each of her two sons and three daughters for life, and after the death of each daughter leaving a husband to pay the income of her share to her husband during his life, and after the death of each of her sons and the survivor of each of her daughters and any husband with whom she might intermarry, leaving children or more remote issue living at the time of such death, in trust for the children or more remote issue of such son or daughter as he or she might appoint, and in default of appointment for the children then living and the issue of such as might be then dead, and in case of the death of any son or daughter without leaving issue, then, after the death and failure of issue of each son, and after the death of the survivor of each daughter so dying and whose issue should so fail and any husband with whom she might have intermarried, then the trustees were to stand possessed of the share to the income of which such son or daughter was entitled, to pay the income thereof equally amongst the survivors of the testatrix's sons and daughters during their lives. And on the death of the last survivor of the sons or daughters and the husbands of daughters there was an ultimate trust of the corpus for the children of sons and daughters who had died leaving children then living and the issue then living of children who should be then dead.

The testatrix died in 1881, leaving her two sons and three daughters her surviving. E., one of the daughters, who at the date of the will was married, died intestate in 1903 without having had any children, and leaving a husband, who died in 1909 :—

Held, that the gift over of the income of her share to the survivors of the testatrix's sons and daughters was not void for remoteness, but that there was no valid gift over of the corpus of her share.

Another daughter, F., was also married at the date of the will. Her husband died in 1895, and she had not married again. She had nine children, all of whom were living and had attained twenty-one. By a deed poll in 1907 in exercise of her power she irrevocably appointed her share to her nine children in equal shares, subject to her life interest :—

Held, that the limitations, by the joint operation of the will and deed of appointment created, of the share to the income of which F. was entitled for her life were not such as must necessarily take effect, if at all, within the limits of the rule against perpetuities ; and consequently that the power had not been validly exercised.

Semble, if F. had appointed merely life interests to her children or even remoter issue in existence at her death, or had appointed

WILL—*continued.*

interests to her children or issue which by the very terms of their creation must vest and take effect if at all within the limits allowed by the rule against perpetuities, such appointments would have been a valid exercise of the power. *In re* NORTON. NORTON *v.* NORTON. **Joyce J. 27**

6. —— *Specific Devise of Freehold House and Premises "in which I now reside"—Purchase of adjoining Plots subsequent to Date of Will—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24—*Contrary Intention—Trustees—Investment—Power to invest in Preference Stock—Fully-paid Preference Shares not within Power—Will—Construction.*

By his will dated in 1885 a testator devised to his wife "all that my freehold house and premises situate at Oakleigh Park, Whetstone, in the county of Middlesex, and known as 'Ankerwyke,' and in which I now reside." The testator died in 1901, and between the date of his will and his death he purchased two plots of adjoining land, one contiguous to his house and the other on the opposite side of the road, using them in connection with his house, and with another plot bought before the date of his will :—

Held, that the expression "and in which I now reside" was a mere additional description of the property and not a vital and essential part of the description having the effect of cutting down the generality of the earlier words, and that what passed under the gift was the house and premises known as "Ankerwyke" at the date of the testator's death.

Held, also, on the facts, that the devise included the plots bought subsequently to the date of the will.

By his will the testator also empowered his trustees to invest any part of the trust estate upon "the debentures or debenture stock, or preference stock of any railway or other company in the United Kingdom":—

Held, that inasmuch as there was a distinction, although a minute one, between the two classes of investments described as preference stock and preference shares, it was not within the power of the trustees to invest any part of the trust estate in the fully-paid preference shares of any joint stock company. *In re* WILLIS. SPENCER *v.* WILLIS – **Eve J. 563**

7. —— *Widowhood—Gift to Wife "during her widowhood"—Bigamous Marriage—Condition—Definition of Period—Knowledge of Parties—Will—Construction.*

The plaintiff Mrs. B.'s husband disappeared in 1894 and was supposed to be drowned, though it was found impossible to trace him. In 1903 Mrs. B. went through the ceremony of marriage with the testator. All the circumstances were explained to the testator and he and Mrs. B. believed that their marriage was perfectly valid, although there might be a slight risk of B. being still alive. They lived together as man and wife until the testator's death in 1906. By his will the testator gave to his wife his household effects "during her widowhood and after her decease or second marriage" he gave them to his daughters. He also gave her the use of a house and an annuity upon similar terms. After the testator's death the plaintiff lived in the house and received the annuity till the autumn of 1910, when it was discovered that B. was still alive. Mrs. B. brought this action for a declaration that she was the person described in the will as the wife of the testator and was entitled as his widow to all the rights and interests given by the will during widowhood :—

Held, that the words "during her widowhood" did not import a condition, and that the plaintiff was entitled to enjoy the property until she died or married again. *In re* HAMMOND. BURNISTON *v.* WHITE – **Parker J. 342**

—— Power of appointment.
See under POWER OF APPOINTMENT.

—— Power of appointment — Exercise — Dutch law—English law—Effect of exercise of power – – – **286**
See CONFLICT OF LAWS.

WINDING-UP—Company.
See under COMPANY.

WORDS—"Cash" – – – – – **41**
See COMPANY. 5.

—— "Colony" – – – – – **58**
See TRUSTEE. 1.

—— "Dangerous place" – – – **133**
See LOCAL GOVERNMENT. 1.

—— House and premises "in which I now Reside" – – – – – **563**
See WILL. 6.

—— "Note" – – – – – **312**
See LOCAL GOVERNMENT. 2.

—— "Purchaser" – – – – – **530**
See EXECUTOR. 2.

—— "Widowhood" – – – – **342**
See WILL. 7.

BRADBURY, AGNEW & CO. LD., PRINTERS, LONDON AND TONBRIDGE.

UL - 7 JAN 1976